Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1993

MICHELLE CORWIN, Registrar of Voters for the CITY AND COUNTY OF SAN FRANCISCO, *et al.*,

Petitioners,

vs.

DENNIS MARK, *et al.*,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Ninth Circuit *en banc* court violated principles of federal jurisdiction laid down by this Court in the related case of *Renne v. Geary*, 501 U.S. 312 (1991), when in this case, the Ninth Circuit invalidated a statute central to California's nonpartisan election system without even addressing the claim based on *Renne* that the complaint was nonredressable?

Whether the Ninth Circuit *en banc* court violated this Court's direction in *Renne v. Geary*, 501 U.S. 312, by invalidating a state statute on its face when the case merely presented a challenge to the *application* of the statute?

Whether the Ninth Circuit *en banc* court violated settled principles of federal jurisprudence by invalidating a state statute in its entirety, when the complaint did not seek that relief?

LIST OF ALL PARTIES

Petitioner Michelle Corwin is the former Registrar of Voters for the City and County of San Francisco. Petitioner Louise H. Renne is the City Attorney for the City and County of San Francisco. Petitioner City and County of San Francisco is a municipal corporation and a political subdivision of the State of California. The City and County is responsible for conducting federal, state and local elections within its jurisdiction. Although a provision of the California Elections Code is challenged in this case, neither the State of California, nor any of its officers, were served or appeared. (The California Secretary of State did file a letter in support of San Francisco's petition to modify the portion of the *en banc* court's Order at issue here. *See* n.11 *post*.)

Respondents Dennis Mark, Bob Geary, Robert Silvestri, Max Woods, Alexa Smith and Terence Faulkner are residents and registered voters of the City and County of San Francisco.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Michelle Corwin, former Registrar for the City and County of San Francisco ("the City"), *et al.*, respectfully pray that a Writ of Certiorari be issued to review the judgment and the Order of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding.

OPINIONS BELOW

The *en banc* Order of the Court of Appeals for the Ninth Circuit ("the Order") is reported under the name *Geary v. Renne* at 2 F.3d 989 (1993), reprinted in Appendix A, p. A-1 to this Petition.

The initial Ninth Circuit panel's opinion is reported under the name *Geary v. Renne* at 914 F.2d 1249, reprinted in Appendix B, p. B-1 to this Petition. The order granting the petition for rehearing of respondents Dennis Mark ("Mark"), *et al.*, and setting a rehearing *en banc* is reported under the name *Geary v. Renne* at 924 F.2d 175, reprinted in Appendix C, p. C-1 to this Petition.

The order of the United States District Court for the Northern District of California (Zirpoli, D.J.) is unpublished and is reprinted in Appendix D, p. D-1 to this Petition.

JURISDICTION

Mark brought this suit on August 30, 1988, in the Northern District of California. The complaint sought relief under 42 U.S.C. §§ 1983 and 1985.

The complaint set forth two claims. Only the first claim is at issue here. It challenged the City's application of California Elections Code § 10012. The second claim,

not at issue here, challenged California Elections Code § 10013.5.

The district court's jurisdiction was based on 28 U.S.C. §§ 1331 and 1343. On April 28, 1989, the Northern District issued its judgment holding both statutes constitutionally deficient.

On the City's appeal, the Ninth Circuit had appellate jurisdiction under 28 U.S.C. § 1291. A unanimous three judge panel reversed the district court's judgment. *See* Appx. B.

Following Mark's successful petition for *en banc* review, and following this Court's decision in *Renne v. Geary*, 501 U.S. 312, 111 S.Ct. 2331 (1991), the City requested leave to brief the issue of the justiciability of both claims for relief. In May 1993, the *en banc* Court granted such permission.

By letter-brief of May 24, 1993, the City challenged the first claim as nonredressable and the second claim as moot. The *en banc* court's September 1, 1993 Order agreed with the City's argument that the second claim was moot, but did not address the redressability of the first claim. *See* Appx. A, p. A-3.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. California Elections Code § 10012(a) and (b) provide in pertinent part as follows:

> (a) Each candidate for nonpartisan elective office in any local agency, including any city, county, city and county or district, may prepare a candidate's statement on an appropriate form provided by the clerk. The statement may include the name, age

> and occupation of the candidate and a brief description of no more than 200 words, of the candidate's education and qualifications expressed by the candidate himself or herself. . . . The statement shall not include the party affiliation of the candidate, nor membership or activity in partisan political organizations. . . .
>
> (b) The clerk shall send to each voter together with the sample ballot, a voter's pamphlet which contains the written statements of each candidate that is prepared pursuant to this section. . . .

2. California Elections Code § 10013.5 provides as follows:

> Not less than 10 calendar days before the clerk submits the official voter's pamphlet referred to in Section 10012 for printing, the clerk shall make a copy of the voter's pamphlet available for public examination in the clerk's office. . . .
>
> During the 10-calendar-day examination period provided by this section, any voter of the jurisdiction in which the election is being held, or the clerk, himself or herself, may seek a writ of mandate or an injunction requiring any or all of the material in the voter's pamphlet to be amended or deleted. A peremptory writ of mandate or an injunction shall issue only upon clear and convincing proof that the material in question is false, misleading, or inconsistent with the requirements of this chapter, and that issuance of the writ or injunction will not substantially interfere with the printing or distribution of official election materials as provided by law. . . .

3. The First Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The background of this action begins on September 11, 1987, with the filing of its immediate predecessor, *Geary v. Renne*, 708 F.Supp. 278 (N.D.Cal. 1988), *rev'd*, 880 F.2d 1062 (9th Cir. 1989), *aff'd*, 911 F.2d 280 (9th Cir. 1990) (*en banc*), *vacated sub. nom. Renne v. Geary*, 501 U.S. 312, 111 S.Ct. 2331 (1991) ("*Renne*"). The *Renne* case was brought by some of the same complainants as in this action.

The *Renne* complaint included three claims for relief. The first challenged various actions by the San Francisco registrar of voters pursuant to California Elections Code §§ 3795 and 5025.[1] Under those sections, the registrar went to court and obtained orders deleting false and misleading statements in ballot arguments to be published in the San Francisco Voter's Information Pamphlet ("the voter's pamphlet").

The district court temporarily abstained from considering the first claim for relief in *Renne* pending resolution

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[1] All statutory references are to the California Elections Code unless otherwise specified.

of an identical action in state court.[2] *See Patterson v. Board of Supervisors*, 202 Cal.App.3d 22 (1988). Following the decision in *Patterson*, the district court consolidated the first claim in *Renne* with this action, *Corwin v. Mark*.

The second claim for relief in *Renne* was dismissed and is not material here.

The third claim for relief in *Renne* challenged various actions by the San Francisco registrar of voters pursuant to Article II, § 6(b) of the California Constitution. That provision forbids California's political parties from endorsing candidates for nonpartisan office. Under that provision, the registrar deleted references to such endorsements from candidate's statements published in the voter's pamphlet. The district court ruled on this claim separately from the first claim, holding in April 1988 that Article II, § 6(b) violated the First Amendment. *Geary v. Renne*, 708 F.Supp. 278.

A panel of the Ninth Circuit disagreed. *Geary v. Renne*, 880 F.2d 1062 (1989). The *en banc* Court of Appeals granted rehearing and reversed the panel's decision, holding that Article II, § 6(b) is unconstitutional. *Geary v. Renne*, 911 F.2d 280 (1990).

In January 1991, this Court granted certiorari to consider the third claim for relief. *Renne v. Geary*, 111 S.Ct. 750 (1991). On June 20, 1991, the Court vacated the Court of Appeals' decision on the ground that the controversy was nonjusticiable. *Renne v. Geary*, 111 S.Ct. 2331. In particular, the Court held that the challenge to Article II,

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[2] As discussed immediately below, because of the delay in considering the first claim, it was separated from the third claim in *Renne*. The third claim was resolved first, and proceeded separately by way of appeal and certiorari to this Court. *Renne*, 501 U.S. 312, 111 S.Ct. 2331. (Because Volume 501 of the United States Reports is not yet published, we cite only the Supreme Court Reporter in the remainder of this Petition.)

§ 6(b) failed to allege a redressable injury because the complainants had not challenged another California law, California Elections Code § 10012. 111 S.Ct. at 2337-2338. The Court reasoned that § 10012 might be construed to permit the registrar to take the same action complained of in *Renne*. *Id.* at 2338.

Significantly, § 10012 is the statute at issue in the present case, *Corwin v. Mark*. Section 10012 authorizes local governments to publish in voter's pamphlets a 200-word statement of qualifications by candidates ("candidate's statements") for nonpartisan office.[3] As part of California's nonpartisan election system, § 10012 forbids references in candidate's statements to the candidate's party affiliation, just as § 10200.5 forbids references to party affiliation on the nonpartisan ballot.[4] *See also* §§ 10007 and 10010.

Mark filed this action, under the name *Mark v. Corwin*, on August 30, 1988, almost a year after the complaint in *Renne* was filed. Section 10012 is challenged in Mark's first claim for relief. That claim alleges that § 10012 violates the First Amendment "insofar as said statute authorizes the administrative censorship of candidate's statements" published in voter's pamphlets. Complaint, prayer, ¶¶ 1 and 3; the Complaint is reprinted as Appendix E, p. E-1 to this Petition.

Importantly, § 10012 is silent as to whether its substantive terms are to be enforced administratively or judicially. However, a neighboring statute, § 10013.5,

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[3] County, city, school, and judicial offices in California are nonpartisan. Cal. Const., art. II, § 6(a); Cal. Elec. Code § 37.

[4] Section 10200.5 states in pertinent part: "*[T]he nonpartisan ballot shall contain only the names of all candidates for nonpartisan offices* and measures to be voted for at the primary election." (Emphasis added.) A sample nonpartisan ballot is sent to each voter with the voter's pamphlet. *See* § 10012(b).

provides for the *judicial* enforcement of all statutes in the chapter of which § 10012 is a part, and specifically mentions § 10012. Nonetheless, in this case, San Francisco's former registrar enforced § 10012 administratively, by removing without a court order portions of candidate's statements identifying the candidate's political party affiliation.[5]

On April 28, 1989, the Honorable Alfonzo J. Zirpoli granted Mark's motion for summary judgment on his first claim for relief. The district court found § 10012 constitutionally deficient on the ground that it authorized a prior restraint without the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965). *See* Appx. D, p. D-9. The district court's decision appears to strike down § 10012 on its face, leaving cities and counties throughout California with no authorization to publish and distribute candidate's statements.

Not at issue here is the district court's simultaneous decision granting summary judgment to Mark on his second claim for relief, a claim that § 10013.5 is invalid on its face. *See* Appx. D, p. D-10. Also not at issue is the district court's grant of summary judgment to the complainants on the first claim for relief in *Geary v. Renne*, consolidated earlier with this action.[6]

The City filed its notice of appeal on May 2, 1989.

On September 14, 1990, a three-judge panel of the Ninth Circuit issued a unanimous opinion reversing the

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[5] The complaint also alleges that in one instance in connection with a 1988 election, the City's former registrar removed from a candidate's statement material unrelated to the candidate's affiliation with a political party.

[6] *See* p. 5 *ante*, and Appx. D, p. D-8. The Ninth Circuit *en banc* court correctly vacated both those judgments as nonjusticiable. *See* Appx. A, p. A-3. Accordingly, those claims are not part of this Petition.

district court's judgment for Mark on all claims. *Geary v. Renne*, 914 F.2d 1249; *see* Appx. B, p. B-4.[7] With respect to the claim at issue here, the challenge to § 10012 in the first claim for relief in *Corwin v. Mark*, Judge Farris' opinion held that "[e]nforcement [of § 10012] is through § 10013.5." 914 F.2d at 1255; *see* Appx. B, p. B-14. In other words, the panel found that § 10012 is properly enforced by judicial order and is therefore facially valid.

The panel also considered the *substantive* validity of § 10012's prohibition on references to partisan affiliation. The panel specifically recognized that in *Renne*, 911 F.2d at 284-286, the Ninth Circuit *en banc* court had invalidated a similar provision of California's nonpartisan election laws, Article II, § 6(b) of the California Constitution.[8] 914 F.2d at 1255; *see* Appx. B, pp. B-14-15. Nonetheless, Judge Farris' opinion distinguished the *en banc* court's decision in *Renne* and held that § 10012's substantive terms do not violate the First Amendment. *Ibid.*

The *en banc* court promptly signalled its disagreement. In a case of procedural history repeating itself, on January 30, 1991, the Ninth Circuit granted the second petition for *en banc* review in a case captioned *Geary v. Renne*, 924 F.2d 175; *see* Appendix C to this Petition, and n.7 *ante*.

On July 11, 1991, shortly before argument was set in the *en banc* court, the California Supreme Court granted review in a closely related state court action, *Clark v. Burleigh*, 283 Cal.Rptr. 381 (1991). *Burleigh* involved a

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[7] On appeal, the consolidated case took the name of the lead action, *Geary v. Renne*.

[8] In September 1990, when the Ninth Circuit panel issued its opinion in this case, this Court had not yet granted certiorari in *Renne*. *See* 111 S.Ct. 750 (Jan. 14, 1991) and p. 5 *ante*. Thus, at the time, there was no reason to doubt the continuing validity of the *en banc* decision in *Renne*.

challenge to the constitutionality of California Elections Code § 10012.1, a companion statute to § 10012.[9]

On July 22, 1991, the Ninth Circuit granted the City's motion to continue the court's consideration of this case pending the state court's decision in *Burleigh*. On December 24, 1992, the California Supreme Court issued that decision and upheld § 10012.1. *Clark v. Burleigh*, 4 Cal.4th 474, 495, 496 (1992).[10] In April 1993, the Ninth Circuit *en banc* court ordered additional briefing on *Burleigh*'s significance to this case.

In May 1993, in response to the City's request, the *en banc* court also ordered additional briefing on jurisdictional issues in light of *Renne v. Geary*, 111 S.Ct. 2331 (1991). In its letter-brief, the City asserted that Mark's first claim was nonredressable because Mark had not challenged two other statutes that would allow for the same injury alleged in the complaint. A copy of the City's May 24, 1993 letter-brief setting forth this argument is reprinted as Appendix F to this Petition.

On September 1, 1993, the eleven-judge *en banc* court issued its summary Order, reversing the panel's decision

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[9] Section 10012.1 provides:

> In addition to the restrictions set forth in Section 10012, any candidate's statement submitted pursuant to Section 10012 by a candidate for judicial office shall be limited to a recitation of the candidate's own personal background and qualifications and shall not in any way make reference to other candidates for judicial office or to another candidate's qualifications, character, or activities. The clerk shall not cause to be printed or circulated any statement which the clerk determines is not so limited or which includes any such references.

[10] The California Supreme Court held that a candidate's statement is a nonpublic forum, and that § 10012.1 is a reasonable regulation of that forum. 4 Cal.4th at 484-495.

upholding § 10012. 2 F.3d 989; *see* Appx. A, p. A-3. The Order did not address the issue of whether Mark's challenge to § 10012 was redressable. Instead, the *en banc* court proceeded past the issue of justiciability and held § 10012 unconstitutional. In its one-sentence rationale, the Order stated that the City had conceded that § 10012 authorizes an invalid prior restraint, a concession the City never made.

On September 15, 1993, the City sought rehearing or alternatively, a modification of the court's Order as to the first claim for relief. On December 16, 1993, the *en banc* court denied the petition.

REASONS FOR GRANTING THE WRIT

This case presents virtually the same issues as in *Renne v. Geary*, 111 S.Ct. 2331, a case this Court decided to review in January 1991. At the substantive core of both cases is the balance between (1) California's right to structure its own system of nonpartisan government and (2) the limits of the First Amendment. In *Renne*, this Court described these substantive issues as having "fundamental and far-reaching import." 111 S.Ct. at 2340.

Ultimately, however, the *Renne* Court declined to reach the substantive issue based upon rules of justiciability that "serve to make the judicial process a principled one." *Ibid.* Among those rules is the precept that a case is not redressable where a complainant challenges one statute but fails to challenge other statutes under which the same injury could recur. *Id.* at 2237. In addition, *Renne* reaffirms that federal courts should not reach a facial challenge to a statute before addressing the constitutionality of the provision "as applied." *Id.* at 2340.

In this case, the Ninth Circuit *en banc* court refused even to consider whether *Renne* directly applies to Mark's challenge to § 10012. Instead, apparently convinced (as it

was in *Renne*) that California's system of nonpartisanship runs afoul of the First Amendment, the *en banc* court proceeded to strike down § 10012, an important statutory element of that system.[11]

Section 10012 is important for several reasons. First, it provides the sole statutory authorization for counties to publish candidate's statements in voter's pamphlets. Candidate's statements are important educational tools for voters to learn about candidates, particularly because the statements are sent to all registered voters. *See* § 10012(b). Candidate's statements are important to candidates, particularly those without substantial means, because these statements provide a publicly subsidized means to advertise their qualifications for office.

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[11] For purposes of this Petition, the City assumes that the Ninth Circuit intended to invalidate § 10012 on its face and in its entirety. The meaning of the Court's decision, however, is not free from doubt, due to the summary nature of the *en banc* court's Order. *See* Appx. A, p. A-3. As the California Secretary of State wrote in a November 16, 1993 letter to the Ninth Circuit in support of San Francisco's petition for modification:

> Of interest and concern to the Secretary of State is the uncertainty surrounding the application of California Elections Code § 10012, if any application may be made at all, to forthcoming elections. We believe that at least two interpretations may be made regarding the wording of the existing order. One would invalidate § 10012 in its entirety. Another would invalidate the section only insofar as it applies to the clerk's authority to delete 'partisan references.' The District Court's order is not published and therefore is not available for clarification should one wish to research the issue without knowing the facts and circumstances surrounding the case.

The California Secretary of State is the chief elections officer of California and is responsible for overseeing the conduct of all elections in the State. Cal. Gov't Code § 12172.5.

Second, even if the *en banc* court intended only to disapprove of the provision within § 10012 prohibiting candidate's statements from identifying the candidate's partisan affiliation, that provision is an important part of California's nonpartisan electoral scheme. Section 10012 helps prevent candidates for nonpartisan office from doing *indirectly* what another statute prevents them from doing *directly*: identifying their political party on the nonpartisan ballot. *See* § 10200.5. A *sample* nonpartisan ballot is mailed to all voters along with the voter's pamphlet in which candidate's statements are published. *See* § 10012(b) and §§ 10007 and 10010. If nonpartisan candidates may identify their party affiliation in candidate's statements, § 10200.5's ban on such identification on the nonpartisan ballot would be meaningless.

Ultimately, the Ninth Circuit should never have reached the issue of the validity of § 10012. Under *Renne*, the case is nonjusticiable because it fails to allege a redressable injury. Even if the controversy were justiciable, under *Renne*, the case should have been resolved as an as-applied challenge.

Certiorari is needed. This Court must insure that federal courts do not reach out unnecessarily to declare state statutes unconstitutional. More pointedly, the Court must assure that the circuit from which *Renne* arrived follows the Court's teachings, particularly in this, *Renne*'s immediate successor.

A. The Ninth Circuit Disregarded This Court's Ruling In *Renne* By Failing Even To Address The Claim That Mark's Complaint Is Nonredressable.

Under our system of federalism, the federal courts' formidable power to declare state statutes invalid on their face is exercised with caution and restraint.

Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975). Plainly, that power is not to be used where the federal court's jurisdiction is in doubt. *Renne v. Geary*, 111 S.Ct. at 2336. In this case, the Ninth Circuit has violated that fundamental rule.

A complainant bears the burden of establishing that a federal court has jurisdiction and that the controversy is justiciable. *Ibid.* The court is without jurisdiction where the complainant lacks standing. *Allen v. Wright*, 468 U.S. 737, 751 (1984). A complainant lacks standing when "[t]here is reason to doubt" that the relief requested will redress the injury alleged in the complaint. *Renne v. Geary*, 111 S.Ct. at 2337-2338; *see ASARCO, Inc. v. Kadish*, 490 U.S. 605, 616-617 (1989).

In *Renne*, the complainants challenged a California constitutional provision under which references to endorsements by a political party were removed from candidate's statements in the San Francisco Voter's Pamphlet. The complaint, however, failed to challenge a statute – ironically, § 10012 – that "might be construed" to permit the very same censorship action. 111 S.Ct. at 2337. Because the complaint sought such incomplete relief, the Court held the injury nonredressable and vacated the judgment. *Id.* at 2337-2338, 2340. This rule serves the important purpose of assuring that federal courts not entertain actions to strike down state laws except when absolutely necessary to remedy constitutional wrongs. *See generally, Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471-476 (1982).

In this case, the same situation exists as in *Renne*. The complainants have failed to meet their burden of showing that the relief sought, even if granted, would completely redress the injury alleged.

A review of the complaint confirms this analysis. The *relief* sought is to invalidate § 10012 only "insofar as said statute authorizes administrative censorship." Complaint, prayer, ¶¶ 1 and 3, reprinted as Appx. E, p. E-8.

That relief, however, would not by itself redress the *injury* that has been alleged:

> Plaintiffs and each of them have been injured by the conduct of the defendants described above *as registered voters who desire to read candidate's statements in their unabridged, unedited, uncensored form.*

Complaint, ¶ 16. (emphasis added); *see* Appx. E, p. E-5. Thus, the injury alleged is the "abridging, editing or censoring" of candidate's statements, whether accomplished administratively or judicially.

Under *Renne*, the question is whether another statute exists under which candidate's statements might be "abridged, edited or censored." Significantly, Mark has *conceded* that another statute exists – § 10013.5 – that could be (and indeed, *has* been) used to delete portions of candidate's statements before they are published in the voter's pamphlet. Under this alternate statute, "voters who desire to read candidate's statements in their unabridged, unedited, uncensored form" would suffer the same injury alleged in this complaint.

California Elections Code § 10013.5 provides:

> [A]ny voter of the jurisdiction in which the election is being held, or the clerk himself or herself may seek a writ of mandate or an injunction requiring any or all of the material in the voter pamphlet to be amended or deleted. A peremptory writ of mandate or an injunction shall issue only upon clear and convincing proof that the material in question is false, misleading or

inconsistent with the requirements of this chapter. . . . [12]

In his May 21, 1993 letter-brief to the Ninth Circuit on the applicability of *Renne* to this case, Mark conceded that § 10013.5 is an " 'alternative' statute under which defendants could obtain censorship of offending materials. . . . "[13] Thus, Mark recognized that under *Renne*, his challenge to the *administrative enforcement* of § 10012 would be nonredressable if he had not challenged § 10013.5. Mark argued, however, that he *had* challenged § 10013.5 in his *second* claim for relief. *See* Appx. G, p. G-4.

While Mark had made such a challenge, the second claim was indisputably moot. The controversy there alleged was not live at the time the complaint was filed. *See Renne*, 111 S.Ct. at 2338. The *en banc* court so held. 2 F.3d 989; *see* Appx. A, p. A-3.[14] Thus, § 10013.5 remained available to permit the (judicial) editing of candidate's

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[12] Section 10013.5 is found in chapter 1 of Division 8 of the California Elections Code. That chapter provides for the mailing of sample nonpartisan ballots. *See* §§ 10007, 10010 and 10012(b). In California's nonpartisan scheme, those ballots may not refer to a candidate's party affiliation. *See* fn. 4 *ante*. Thus, to permit candidate's statements to refer to party affiliation would "be inconsistent with the requirements of this chapter. . . . " § 10013.5.

[13] A copy of Mark's May 21, 1993 letter-brief on justiciability issues is reprinted as Appendix G to this Petition. The concession appears at page G-4.

[14] The sole controversy alleged in the second claim for relief involved the use of § 10013.5 "in connection with the *1986* general election." Complaint, ¶ 20 (emphasis added); *see* Appx. E, p. E-6. The complaint was not filed until August 30, 1988, nearly two years *after* the 1986 general election. *Id.*, p. 1; *see* Appx. E, p. E-1. Because the Ninth Circuit vacated the judgment as to this moot claim, it is not a part of this Petition.

statements and the injury alleged in this complaint. Nonetheless, despite Mark's written concession that § 10013.5 is an " 'alternative' statute under which defendants could obtain censorship," the *en banc* court's Order failed even to address the City's argument that Mark's first claim was nonredressable.

In addition, California Elections Code § 10015, a statute also independent of § 10012, also "might be construed to prevent candidates from mentioning [party affiliation] in voter pamphlets." *Renne*, 111 S.Ct. at 2338. Section 10015(a) provides that "[a]ny voter may seek a writ of mandate alleging that an error or omission has occurred . . . in the printing of, a . . . voter pamphlet, . . . or that any neglect of duty has occurred . . . ," where "the error, omission, or neglect [of duty] is in violation of this code or the Constitution."[15]

A registrar's permitting candidates to identify their party affiliation in a pamphlet published and distributed by the government violates provisions of the California Elections Code and Constitution establishing this state's nonpartisan electoral system. *See, e.g.*, Cal. Const., Art. II, § 6; Cal. Elec. Code §§ 37, 6401.5, and 10200.5. Such an action by a registrar would constitute an "error, omission or neglect [of duty]" within the meaning of § 10015(a). Thus, § 10015(a) "might be construed" to permit edited

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[15] The full text of § 10015(a)(1) and (a)(2) is as follows:

(a)(1) Any voter may seek a writ of mandate alleging that an error or omission has occurred or is about to occur in the placing of any name on, or in the printing of, a ballot, sample ballot, voter pamphlet or other official matter, or that any neglect of duty has occurred or is about to occur.

(a)(2) A peremptory writ of mandate shall issue only upon proof that the error, omission, or neglect is in violation of this code or the Constitution and that issuance of the writ will not substantially interfere with the conduct of the election.

candidate's statements. As a result, "there is reason to doubt that the injury alleged can be redressed" simply by invalidating the administrative enforcement of § 10012. *See Renne*, 111 S.Ct. at 2338.[16]

By its letter-brief of May 24, 1993, the City expressly asserted that *Renne* compels the dismissal of this action as nonjusticiable because Mark failed to challenge § 10013.5 effectively and failed to challenge § 10015 at all. *See* Appx. F, pp. F-6-7. The *en banc* court ignored the argument, however, and proceeded to hold § 10012 unconstitutional.

In ignoring this argument, the Ninth Circuit also disregarded the rules laid down by this Court in *Renne*, "[r]ules of justiciability [that] serve to make the judicial process a principled one." 111 S.Ct. at 2340. Standing is a prerequisite to constitutional adjudication not only to insure a concrete case or controversy, but also to avoid unnecessary intrusion by the federal judiciary into matters of legislative and local prerogative. As this Court stated in *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. at 475-476:

> Article III . . . is not merely a troublesome hurdle to be overcome if possible so as to reach the "merits" of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787, a charter which created

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[16] We also note that in the recent case of *Clark v. Burleigh*, 4 Cal.4th at 480, the California Supreme Court upheld the judicial editing of a judicial candidate's statement where the local registrar of voters invoked California Code of Civil Procedure § 1060 to obtain the judicial order compelling the registrar to amend the statement. California Code of Civil Procedure § 1060 is the California statute providing for declaratory relief. *See also*, Cal. Code of Civ. P. § 1085.

> a general government, provided for the interaction between that government and the governments of the several States, and was later amended so as to either enhance or limit its authority with respect to both States and individuals.

(Footnote omitted.)

Certiorari should be granted to compel adherence to this Court's rulings and to insure that lower federal courts do not invalidate state statutes not properly before them.

B. The Courts Below Violated This Court's Direction, Reaffirmed in *Renne*, (1) To Avoid Invalidating State Laws Unnecessarily, And (2) To Avoid Facial Challenges Where A Statute Has Been Misapplied.

The *en banc* court in this case violated a second principle reaffirmed in *Renne*: that federal courts must not invalidate a statute on its face where the statute has been misapplied. *Renne*, 111 S.Ct. at 2340. This rule is but a corollary of a fundamental principle violated earlier by the district court: Federal courts are to avoid striking down statutes when a means of preserving the statute's constitutionality is readily available. *E.g., Frisby v. Schultz*, 487 U.S. 474, 483 (1988).

1. The District Court Erred in Refusing To Preserve The Constitutionality Of § 10012 By Reading It Together with § 10013.5.

The district court ruled that § 10012 was constitutionally deficient because "it does not provide any of the procedures required by *Freedman* [*v. Maryland*, 380 U.S. at 58-60]." *See* Appx. D, p. D-9. In *Freedman*, this Court held

that to satisfy due process, a statute authorizing censorship by an administrative body must provide three basic safeguards. The scheme must:

> (1) place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor; (2) require "prompt judicial review" – a final judicial determination on the merits within a specified, brief period – to prevent the administrative decision of the censor from achieving an effect of finality; and (3) limit to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of the final judicial determination.

Blount v. Rizzi, 400 U.S. 410, 417 (1971).

In this case, California Elections Code § 10013.5, which specifically refers to § 10012, provides all of these procedural safeguards.[17] Nonetheless, the district court refused to read § 10012 together with § 10013.5 on the ground that the court "had no jurisdiction to issue a limiting construction regarding a state law. *United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971)." *See* Appx. D, p. D-9.

Thirty-seven Photographs does not control this case. There, this Court considered the constitutionality of a *federal*, not a state statute. The Court *did* issue a limiting construction of the federal statute in order to preserve its

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[17] Mark has argued that § 10013.5 does not assure a "prompt, *final* judicial decision," as required by *Freedman*, because the statute guarantees no prompt *appellate* review. As this Court has stated, however, "[T]he assurance of a 'prompt final judicial decision' is made . . . by the guaranty of a speedy determination in the *trial* court." *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690 n.15 (1968) (citation omitted, emphasis added).

constitutionality. 402 U.S. at 370-375. In the passage cited by the district court in this case, the *Thirty-seven Photographs* Court distinguished *Freedman* by observing that *Freedman* involved *state* legislation, which the Court lacked the power to "authoritatively construe" by adding language needed to save the statute. *Id.* at 369.

That dictum has no bearing on this case. Here, there is no need to "construe" § 10012 by *adding* language not enacted by California's Legislature: That language *already exists* in a neighboring statute, § 10013.5. Section 10013.5 specifically refers to § 10012, and the California Legislature clearly intended § 10013.5 as the enforcement vehicle for § 10012. *See, e.g., Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1078 (9th Cir.), *cert. denied*, 496 U.S. 907 (1990). All the district court (and the *en banc* Court of Appeals) had to do in this case was what the unanimous, three-judge panel of the Ninth Circuit did: read together two neighboring statutory provisions and declare that *judicial* enforcement of § 10012 was constitutionally required.[18]

By finding § 10012 deficient despite the availability of § 10013.5, the district court "ran afoul of the well-established principle that statutes will be interpreted to avoid constitutional difficulties." *Frisby v. Schultz*, 487 U.S. at 483.[19] California courts follow the same rule, so it is clear that if called upon to review § 10012, they would find the statute constitutional by reading it together with

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[18] In other words, the district court could have declared that San Francisco's former registrar acted improperly in deleting material without obtaining a court order, but that the actions of one county's registrar did not, and could not, form a basis for invalidating § 10012 on its face.

[19] Significantly, in *Frisby*, this Court did exactly what the district court here said it had no jurisdiction to do: namely, the Court issued a limiting construction regarding a state law in order to preserve its constitutionality. *See Frisby*, 487 U.S. at 483.

§ 10013.5. *See, e.g., People v. Freeman*, 46 Cal.3d 419, 425 (1988); *see generally, Clark v. Burleigh*, 4 Cal.4th at 480 (upholding statute prohibiting references to other candidates in judicial candidate's statements, where registrar enforced statute through judicial order).

Thus, the district court (and the Ninth Circuit *en banc* court) should have assumed that state courts would have applied § 10012 consistent with the "constitutional command" of *Freedman*. *See, Time, Inc. v. Hill*, 385 U.S. 374, 397 (1967); *Erznoznik v. City of Jacksonville*, 422 U.S. at 216 ("[A] state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts."); *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) ("Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute."). Certiorari should be granted to assure that the lower federal courts do not invalidate state statutes when a means to preserve their constitutionality is readily available.

2. The Ninth Circuit Violated The Teaching of *Renne* By Reaching The Question Of § 10012's Validity When The Case Should Have Been Resolved On The Ground That The Statute Was Misapplied.

In affirming the district court's order, the *en banc* court violated another key teaching reaffirmed in *Renne*: Where statutes are applied in an unconstitutional manner, federal courts should decline even to reach the issue of facial validity. *See Renne v. Geary*, 111 S.Ct. at 2340. In this way, federal courts may avoid invalidating federal and state statutes unnecessarily. *Ibid.*; *Bd. of Trustees v. Fox*, 492 U.S. 469, 484-486 (1989).

In this case, the City recognized that its former registrar had misapplied § 10012 by deleting portions of candidate's statements without obtaining a court order. Thus,

the City signalled its acceptance of the Ninth Circuit panel's decision that § 10012 is enforced judicially through § 10013.5. *See* 914 F.2d at 1255; Appx. B at p. B-14. The City took this position aware that under *Renne* and *Fox*, the misapplication of the statute resolved the case without any need for the *en banc* court to address the facial validity of § 10012.

Nonetheless, the Ninth Circuit *en banc* court proceeded to reach that issue. Mysteriously, the court did so by converting the City's recognition that the statute had been misapplied, into a "concession" that the statute was unconstitutional. The *en banc* Order states:

> The city and county and other appellants concede that section 10012 is constitutionally deficient in that it authorizes an administrative officer to impose a prior restraint on speech without adequate procedural safeguards.[20]

In effect, the Order asserts that the City abandoned its appeal. The City did no such thing. Indeed, far from conceding that § 10012 *authorized* administrative censorship, the City was asserting just the opposite: namely, that its former registrar had acted *beyond* the authority granted by §§ 10012 and 10013.5 when she deleted materials in candidate's statements without judicial approval.

The City recognizes that this Court does not sit to review decisions relying upon concessions, actual or attributed. Even so, for several reasons, this case is exceptional and worthy of the Court's attention.[21]

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[20] *See* Appx. A, p. A-3. The "other appellants" in this case are all city officials or former city officials sued in their official capacity and represented by the City.

[21] The City does not assert that the Ninth Circuit intentionally mischaracterized the City's position in an attempt to insulate from review the *en banc* court's invalidation of

First, the *en banc* court should never have even reached the question of the validity of the statute (or the question of any concession by the City), given that Mark lacked standing in this case. *See* pp. 13-18 *ante*.

Second, even if Mark did have standing, the Ninth Circuit should not have reached the facial validity of the statute, but should have simply declared that the statute was misapplied. And the Ninth Circuit reached this unnecessary result in what amounts to the very same case as *Renne*, the case in which this Court instructed the Ninth Circuit not to invalidate state laws unnecessarily.

Finally, the effect of this excessive judicial activism is that the Ninth Circuit has cast a cloud over a vital provision of California's election law, based solely on a concession of invalidity that was never made.[22]

To demonstrate that the concession was never made, we briefly review the record. The City's briefs in the Ninth Circuit consistently maintained that § 10012 did *not* authorize an invalid prior restraint. In the City's opening brief, we argued that § 10012 is valid, emphasizing that the statute is enforceable judicially through § 10013.5. *See* Appellant's Brief, Ninth Circuit, 11/6/89, pp. 33-34; Appx. H, pp. H-4-5.[23] The three-judge panel unanimously adopted this argument and upheld § 10012. *Geary v. Renne*, 914 F.2d at 1255; *see* Appx. B, p. B-14.

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§ 10012. Even an unintentional mischaracterization, however, should not have the effect of permitting a lower court to disregard this Court's instructions.

[22] Further, even if the City had conceded the deficiency of § 10012 – which we did not – the inadvertent concession of one local entity should not form the basis for the wholesale invalidation of a state statute.

[23] Copies of the pages cited from the briefs in the Ninth Circuit are reprinted as Appendix H, p. H-1 to this Petition.

Following the panel's decision, the City continued to contest Mark's claim that § 10012 was constitutionally deficient. *See* City's Answer To Petition For Rehearing, 11/19/90, pp. 13-14 ("Section 10012 Does Not Authorize Administrative Censorship."); *see* Appx. H, pp. H-7-8. Later, on May 10, 1993, in its brief on the significance of *Clark v. Burleigh*, the City wrote to the *en banc* court:

> [In *Clark v. Burleigh*, 4 Cal.4th 474], the court upheld § 10012.1, which *mandates* that the county clerk "shall not cause to be printed or circulated any statement which the clerk determines" to violate the statute's terms. Section 10012 includes no such mandate. *If § 10012.1 is not facially invalid for authorizing administrative censorship, neither is § 10012.*

Appellant's Brief on *Clark v. Burleigh*, 5/10/93, pp. 6-7 (first emphasis original, second emphasis added); *see* Appx. H, p. H-12.

In a footnote to this passage, the City emphasized that Mark's facial challenge to § 10012 could not succeed, even if the City's former registrar *misapplied* the statute in this case:

> Mark may seek to distinguish *Burleigh* on the ground that the registrar there actually obtained a judicial order deleting the offending material, while the registrar here did not. *Such a claim, however, goes to the application of § 10012 and not to its facial validity.* [¶] The City accepts that § 10012 is properly enforced only through judicial proceedings.

Appellant's Brief On *Clark v. Burleigh*, 5/10/93, p. 7 n. 6 (emphasis added); *see* Appx. H, p. H-12.

By "accepting" that § 10012 is enforced judicially, the City was simply accepting what the Ninth Circuit panel had said and what its decision implied: namely, that

§ 10012 did not authorize its administrative enforcement and that the City had misapplied the statute in the past.

The City is aware of but one other basis on which the Ninth Circuit may have found a "concession" that the statute itself was invalid. At the June 24, 1993 hearing before the *en banc* court, counsel for the City raised the argument set forth in the next section of this Petition:

> COUNSEL: It is a settled principle of federal jurisprudence and comity that a federal court, even in a First Amendment case, should not extend its invalidation of a statute beyond what is necessary to dispose of the case. . . .
>
> In this case, the relief that was sought was invalidating § 10012 "insofar as it authorized administrative censorship." If you get past the justiciability question, the limitation on the district court, what it should have done was to say, "This statute, I can resolve this case by simply invalidating it procedurally, but leaving 10012 available substantively, leaving it on the books," and that's particularly so because the challenge to § 10013.5, as we have argued, is moot. . . . [24]

This statement, though inartful, was not a concession of § 10012's deficiency. Rather, the statement was an attempt to make the argument that even if the court found the statute procedurally overbroad, the district court could not invalidate § 10012 as a whole. *See* pp. 27-29 *post*. The City's position that § 10012 is *not* defective

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[24] This transcription of the argument comes from a tape recording of the hearing obtained from the Clerk of the Ninth Circuit. A full transcription of the recording is attached to this petition as Appx. I, p. I-1. The passage quoted above is set forth at Appx. I, p. I-11.

is clear from the colloquy with Chief Judge Wallace which immediately followed the statement quoted above:

COURT: Counselor, do you have a suggestion as to how we could parse this statute so we could strike down only a part of it to deal directly with the administrative censorship point?

COUNSEL: Well, what the panel in this case said on this particular point was that § 10012 is enforced through § 10013.5, and that point, by the way, was also made in Judge Hug's decision in *Kaplan* in the second paragraph. He says exactly the same thing. Section 10013.5 is the means of enforcing § 10012 and § 10012.1. So that basically what the court would say would be, "10012, it must be enforced judicially."

COURT: *That wouldn't be a striking of the statute. That would be a form of declaratory relief.*

COUNSEL: *I suppose that's correct.*

COURT: *And I don't suppose anyone disagrees with the analysis . . . that 10012 merely sets up what can be done and its enforceability is in 10013.5,* and what the plaintiffs are asking is that you do it that way and the City not administratively use censoring but go to the court. *Your view is, as I understand it, that . . . that's what the district court should have done, have said that "You may not administratively enforce that section, you can enforce it only through 10013.5,"* is that correct?

COUNSEL: *That's correct.* Our view is . . .

COURT: And the City would be happy with that?

COUNSEL: That's correct, your Honor. The district court should not have gone beyond, should not have gone beyond that point and . . .

COURT: And that's all the plaintiff asked for.

COUNSEL: That's correct, your Honor. Absolutely correct.

See Appx. I, pp. I-12-13 (emphases added).[25]

This colloquy confirms that the City's position was that § 10012 is constitutional in that it does not authorize administrative censorship, but is enforced judicially through § 10013.5. Had the Ninth Circuit followed this Court's direction in *Renne*, the *en banc* court would have done exactly what Chief Judge Wallace suggested: declare that § 10012 had been misapplied, rather than hold it unconstitutional.[26]

Certiorari should be granted. In view of the conflict between the decision below and this Court's consistent instruction to avoid unnecessary constitutional adjudication, the Court may wish to consider summary disposition.

C. The Courts Below Violated Fundamental Principles Of Federal Jurisprudence By Granting Relief That Appears To Go Beyond What Was Sought And Beyond What Was Necessary To Resolve The Case.

The complaint in this case sought only to invalidate § 10012 "insofar as said statute authorizes administrative censorship of candidate statements." Appx. E, p. E-8.

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[25] The City quoted this colloquy verbatim in the City's September 15, 1993 Petition For Rehearing Before The *En Banc* Court Or Alternatively, For Modification Of Order. The *en banc* court denied the petition on December 16, 1993.

[26] The complaint in this case sought declaratory relief as well as injunctive relief. Complaint, prayer, §§ 1 and 3; *see* Appx. E, p. E-8.

Given this fact, a federal court cannot properly grant any greater relief. As this Court has stated:

> Nor does the First Amendment involvement in this case render inapplicable the rule that *a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it.*

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 502 (1985) (emphasis added).

In this case, it appears that the courts below have violated this principle. The uncertainty arises from the fact that the district court's unpublished order, and the Ninth Circuit's summary Order are less than clear. The district court found that § 10012 was "constitutionally deficient" because it did not provide adequate procedural safeguards as required by *Freedman*. *See* Appx. D, p. D-9. The Ninth Circuit summarily affirmed, leaving the City (and the chief elections officer of the state, *see* n.11 *ante*) uncertain as to (1) whether § 10012 is wholly unenforceable; (2) whether only the portion of the statute that prohibits the identification of political party affiliation is unenforceable; or (3) whether the statute is completely enforceable so long as it is enforced judicially. For purposes of this Petition, we assume that the decision renders the statute completely unenforceable. *See* n.11 *ante*.

In so holding, the district court and the *en banc* Court of Appeals have transgressed the rule set forth in *Brockett*. The challenge here is solely to the administrative enforcement of § 10012. Thus, the most relief that could be granted would be to do what Mark asked: declare § 10012 invalid (and enjoin its enforcement) only "insofar as said statute authorizes . . . *administrative* censorship." The *en banc* Order, however, appears to invalidate the statute as a whole, eliminating the sole statutory authorization in California to print and distribute candidate's statements to voters in local, nonpartisan elections.

This Court should grant certiorari to assure that an important provision of California's Elections Code is not nullified by a federal court acting beyond its proper authority.

CONCLUSION

In at least three ways, the Ninth Circuit *en banc* court has disregarded this Court's directions in *Renne v. Geary*, 111 S.Ct. 2331, and other cases, to abide by jurisprudential rules that "serve to make the judicial process a principled one." 111 S.Ct. at 2340.

First, the Ninth Circuit failed even to address the claim that respondents Dennis Mark, *et al.*, lack standing, having failed to allege a redressable injury. The *en banc* court should have followed this Court's teaching in *Renne* and held the action here nonjusticiable.

Second, even if Mark had standing, the Ninth Circuit ignored *Renne*'s direction in a second respect: The lower court proceeded to hold § 10012 unconstitutional before considering that the challenge here was really to the application of statute. To reach this result, the court mischaracterized the City's recognition that the City had misapplied the statute as a concession that the statute was unconstitutional.

Finally, even if § 10012 were deficient on its face, the *en banc* Court of Appeal appears to have granted relief beyond what was sought and beyond what was needed to resolve the case. In so doing, the court exceeded the proper limits of federalism.

The petition for certiorari should be granted.

DATED: March 14, 1994

Respectfully submitted,

LOUISE H. RENNE
City Attorney

DENNIS AFTERGUT
Chief Assistant City Attorney

Attorneys for Petitioners

APPENDIX A

Bob GEARY; Robert Silvestri; Dennis Mark; Melissa Gundrun; Wayne Johnson; David Soule; Max Woods; Peter Johnson; Robert Gebert; Election Action; Terence Faulkner; Sudi Trippet, Plaintiffs-Appellees,

v.

Louise RENNE, San Francisco City Attorney; Diane Feinstein; Jay Patterson; San Francisco Board of Supervisors; City and County of San Francisco; San Francisco Registrar of Voters, Defendants-Appellants.

Dennis MARK; Bob Geary; Robert Silvestri; Terence Faulkner; Max Woods; Alexa Smith, Plaintiffs-Appellees,

v.

Michelle CORWIN, Acting Registrar of Voters; Louise Renne, San Francisco City Attorney; City and County of San Francisco, Defendants-Appellants.

Dennis MARK; Bob Geary; Robert Silvestri; Terence Faulkner; Max Woods; Alexa Smith, Plaintiffs-Appellants,

v.

Michelle CORWIN; Louise Renne, San Francisco City Attorney; City and County of San Francisco, Defendants-Appellees.

Bob GEARY; Robert Silvestri; Dennis Mark; Melissa Gundrun; Wayne Johnson; David Soule; Max Woods; Peter Johnson; Robert Gebert; Election Action; Terence Faulkner; Sudi Trippet, Plaintiffs-Appellants,

v.

Louise RENNE, San Francisco City Attorney; Diane Feinstein, Mayor; Jay Patterson; San Francisco Board of Supervisors; City and County of San Francisco; San Francisco Registrar of Voters, Defendants-Appellees.

Nos. 89-15601, 89-15603, 89-15719 and 89-15720.

United States Court of Appeals,
Ninth Circuit.

Argued En Banc and Submitted
June 24, 1993.

Decided Sept. 1, 1993.

Dennis Aftergut, Chief Asst. City Atty., San Francisco, CA, for defendants-appellants-appellees.

Arlo Smith, San Francisco, CA, for plaintiffs-appellees-appellants.

Appeal from the United States District Court for the Northern District of California, Alfonso J. Zirpoli, Jr., District Judge, Presiding.

Before: WALLACE, Chief Judge, HUG, SCHROEDER, FLETCHER, PREGERSON, NORRIS, BEEZER, BRUNETTI, LEAVY, RYMER, and T.G. NELSON, Circuit Judges.

ORDER

After argument in these consolidated cases,[1] which challenge the facial constitutionality of California Elections Code §§ 3795, 5025, 10012, and 10013.5, on rehearing en banc of the panel decision, *Geary v. Renne*, 914 F.2d 1249 (9th Cir.1990), which is ordered withdrawn,

IT IS ORDERED that in *Mark, et al. v. Corwin, et al.*, No. 89-15603, the district court's grant of summary judgment to plaintiffs on their challenge to section 10012 in district court case number C 88 3483 AJZ is affirmed. The city and county and other appellants concede that section 10012 is constitutionally deficient in that it authorizes an administrative officer to impose a prior restraint on speech without adequate procedural safeguards.

IT IS FURTHER ORDERED that the judgments are vacated and the cases remanded with instructions to dismiss without prejudice for lack of a justiciable controversy on the claims relating to the challenge of section 3795 and 5025 in *Geary, et al. v. Renne, et al.*, No. 89-15601, and the claim in *Mark, et al. v. Corwin, et al.*, No. 89-15603, which challenges section 10013.5. *See Renne v. Geary*, ___ U.S. ___, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991).

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[1] No. 89-15601 is *Geary et al. v. Renne et al.* and No. 89-15720, *Geary et al. v. Renne et al.*, is the cross-appeal. No. 89-15603 is *Mark et al. v. Corwin et al.*, No. 89-15719, *Mark et al. v. Corwin et al.*, is the cross-appeal.

APPENDIX B

Bob GEARY; Robert Silvestri; Dennis Mark; Melissa Gundrun; Wayne Johnson; David Soule; Max Woods; Peter Johnson; Robert Gebert; Election Action; Terence Faulkner; Sudi Trippet, Plaintiffs-Appellees,

v.

Louise RENNE, San Francisco City Attorney; Diane Feinstein; Jay Patterson; San Francisco Board of Supervisors; City and County of San Francisco; San Francisco Registrar of Voters, Defendants-Appellants.

Dennis MARK; Bob Geary; Robert Silvestri; Terence Faulkner; Max Woods; Alexa Smith, Plaintiffs-Appellees,

v.

Michelle CORWIN, Acting Registrar of Voters; Louise Renne, San Francisco City Attorney; City and County of San Francisco, Defendants-Appellants.

Dennis MARK; Bob Geary; Robert Silvestri; Terence Faulkner; Max Woods; Alexa Smith, Plaintiffs-Appellants,

v.

Michelle CORWIN; Louise Renne, San Francisco City Attorney; City and County of San Francisco, Defendants-Appellees.

Bob GEARY; Robert Silvestri; Dennis Mark; Melissa Gundrun; Wayne Johnson; David Soule; Max Woods; Peter Johnson; Robert Gebert; Election Action; Terence Faulkner; Sudi Trippet, Plaintiffs-Appellants,

v.

Louise RENNE, San Francisco City Attorney; Diane Feinstein, Mayor; Jay Patterson; San

Francisco Board of Supervisors; City and County of San Francisco; San Francisco Registrar of Voters, Defendants-Appellees.

Nos. 89-15601, 89-15603, 89-15719 and 89-15720.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 4, 1990.

Decided Sept. 14, 1990.

In action involving facial challenge to constitutionality of four sections of the California election law, the United States District Court, Northern District of California, Alfonso J. Zirpoli, J., struck down three sections in part and struck down all of the fourth section. On appeal, the Court of Appeals, Farris, Circuit Judge, held that: (1) sections allowing state to remove "false, misleading, or inconsistent" material from candidate statements and from statements made by persons or groups supporting or opposing question on ballot when statements were submissions made to voters' information pamphlet did not violate First Amendment; (2) lack of immediate appellate review of decision to delete materials did not render those sections unconstitutional; and (3) section prohibiting candidate statements in voters' information pamphlet from making reference to candidate's party affiliation or any partisan activities when office sought was nonpartisan position did not violate First or Fourteenth Amendments.

Affirmed in part and reversed in part.

See also 708 F.Supp. 278.

Arlo Hale Smith, San Francisco, Cal., for plaintiffs-appellees-cross-appellants.

Randy Riddle, Deputy City Atty., San Francisco, Cal., for defendants-appellees.

Pebbles Trippet, San Francisco, Cal., in pro. per., for plaintiff-appellee-cross-appellant.

Appeal from the United States District Court for the Northern District of California.

Before SNEED, FARRIS and FERNANDEZ, Circuit Judges.

FARRIS, Circuit Judge:

This case involves a facial challenge to the constitutionality of four sections of California election law. Cal.Elec.Code §§ 3795, 5025, 10012 & 10013.5. Three sections (3795, 5025, and 10013.5) allow the state to remove "false, misleading, or inconsistent" material 1) from candidate statements and 2) from statements made by persons or groups supporting or opposing a question on the ballot, when the statements are submissions made to a voters' information pamphlet. The fourth section (10012) prohibits candidate statements in the pamphlet from making reference to the candidate's party affiliation or any partisan activities when the office sought is a nonpartisan position. The government assembles, publishes, and distributes the pamphlet.

The district court struck down the first three sections, *except* it upheld the removal of "inconsistent" statements,

and it struck down all of the fourth section. We find all sections to be constitutional.

ISSUES

1) Does the government violate the first amendments by excluding statements submitted for a voter information pamphlet, when a judge finds those statements, by clear and convincing evidence, to be false, misleading or inconsistent with the requirements of the statute?

2) Does the government violate the first amendment by prohibiting candidates for nonpartisan offices from making reference to their party affiliation or partisan activities in the candidate's statement?

FACTS

The City and County of San Francisco, pursuant to local and state law, prepares, publishes, and distributes a voters' information pamphlet. The pamphlet contains statements from individuals and groups, arguing for or against the initiatives, ordinances, propositions, or measures appearing on the ballot. It also contains personal statements from candidates for nonpartisan office. The pamphlets, along with a sample ballot, are mailed to all voters at least ten days prior to the election. Some ballot statements are recognized as being from "official" supporters or opponents and are included free of charge. San Francisco Admin. Code § 5.74.4. All other ballot statements may be included free of charge if the person or group submitting the statement collects a sufficient

number of signatures or if it pays a fee to defray the cost of publication. San Francisco Admin.Code §§ 5.74.8, 5.74.9. The candidate *may* be charged for his pro rata share of the expense of publishing his personal candidate statement. Cal.Elec.Code § 10012. The statements can range in length from 250 to 400 words, depending on which specific statute section authorizes the statement. *See, e.g.*, Cal.Elec.Code § 10012.

Ballot statements are subject to editing pursuant to three virtually identical sections of the California Elections Code: sections 3795 (county ordinances, initiatives, or measures, and rebuttals), 5025 (municipal proposals, ordinances, or measures, and rebuttals), and 10013.5 (candidate statements). Each provides for a ten-day period before the pamphlet is submitted for printing during which voters or the clerk may review the statements and

> may seek a writ of mandate or an injunction requiring any or all of the material in voter's pamphlet to be amended or deleted. A peremptory writ or an injunction shall issue only upon clear and convincing proof that the material in question is false, misleading, or inconsistent with the requirements of this chapter, and the issuance of the writ or injunction will not substantially interfere with the printing or distribution of official election materials as provided by law. . . . [T]he candidate [or author] shall be named as the real party in interest.

See, e.g., Cal.Elec.Code § 10013.5. At issue is whether the power to strike statements as "false, misleading, or inconsistent with the requirements of this chapter" constitutes

an infringement of the first amendment. The "requirements of this chapter" are simple with reference to section 3795 and 5025: the arguments must be "for or against" the measure. *See, e.g.,* Cal.Elec. Code § 3783. Section 10013.5's "requirements" are a bit more specific: it "*may* include the name, age and occupation of the candidate and a brief description . . . of the candidate's education and qualifications. . . . " (Emphasis added.) *See* Cal. Elec.Code § 10012.

The section controlling reference to candidate party affiliation provides

> [t]he statement shall not include the party affiliation of the candidate, nor the membership or activity in partisan political organizations.

Cal.Elec.Code § 10012.

STANDARD OF REVIEW

We review first amendment issues de novo. *See Acorn v. City of Phoenix,* 798 F.2d 1260, 1263 (9th Cir.1986); *Carreras v. City of Anaheim,* 768 F.2d 1039, 1042 n. 2 (9th Cir.1985).

DISCUSSION

I. Ballot Statements: Sections 3795, 5025 and 10013.5

a. Statutes Not Unduly Burdensome on First Amendment Interests

This case involves control of political speech in the setting of a political campaign. Several cases have invalidated statutes attempting to regulate campaign speech.

See, e.g., Brown v. Hartlage, 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982) (invalidating state regulation that directly restricted a candidate's offering of ideas to the voters); *Vanasco v. Schwartz*, 401 F.Supp. 87 (D.N.Y. 1975) (three judge panel) (invalidating statute which prohibited any attacks on candidates' race, sex, religion, or ethnic background, as well as misrepresentations of any candidates' qualifications, position, or party affiliation); *aff'd*, 423 U.S. 1041, 96 S.Ct. 763, 46 L.Ed.2d 630 (1976); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct.2831, 41 L.Ed.2d 730 (1974) (invalidating law requiring paper to provide reply space to criticized candidate); *Mills v. Alabama*, 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966) (invalidating law prohibiting election day editorials urging vote a certain way). Those cases involved blanket prohibitions of all statements falling within the purview of the applicable statute, including criminal and civil penalties.

This case is different. The government makes no attempt to keep the material it deletes from the voters' pamphlet from generally reaching the public. The regulations would merely preclude the material from reaching the public through the government's voters' pamphlet, a single narrow forum. There is no criminal or civil penalty involved. The challenged statutes place no restriction upon political speech by any candidate or person except as it is submitted for inclusion in the voters' pamphlet. Plaintiffs make no showing that more traditional avenues for political expression are inadequate to disseminate their ideas.

Geary argues that the possibility of litigation may "chill" expression, *see New York Times Co. v. Sullivan*, 376

U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), even though there is no provision for penalty or punishment. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974) ("punishment of error [in deciding to publish speech that may not be protected] runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press"). We find this argument unpersuasive. The statute does not include sanctions. An author risks nothing except possible deletion. The government voters' pamphlet supplements rather than diminishes usual political speech and therefore enhances dissemination of information. Further, this is not a situation where the government is itself speaking, raising the concern that its great resources may be able to "drown out" private voices and exert undue influence. *See generally* M. Yudof, *Government Speech* (1983).

Although the government does not author the statements, it has an interest in the messages that it assembles, publishes, and distributes and may therefore appear to approve. It is comparable to the situation of a private publisher. *See Estiverne v. Louisiana State Bar Ass'n*, 863 F.2d 371 (5th Cir.1989). The Supreme Court has recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974), *quoted in Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 1569, 75 L.Ed.2d 547 (1983). The state has a proper interest in assuring the integrity of the election process. The state wants to provide accurate and sensible information

to its voters, enabling them to make the most informed use of their franchise. These are significant government interests recognized by the Supreme Court. *See Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 109 S.Ct. 1013, 1023, 103 L.Ed.2d 271 (1989) ("State may regulate the flow of information between political associations and their members when necessary to prevent fraud and corruption."); *Anderson*, 460 U.S. at 796, 103 S.Ct. at 1574, 75 L.Ed.2d 547 ("There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election."); *Brown v. Hartlage*, 456 U.S. 45, 52, 102 S.Ct. 1523, 1528, 71 L.Ed.2d 732 (1982) ("States have a legitimate interest in preserving the integrity of their electoral processes."); *Buckley v. Valeo*, 424 U.S. 1, 27, 96 S.Ct. 612, 638, 46 L.Ed.2d 659 (1976) ("Congress could legitimately conclude that the avoidance of the appearance of improper influence 'is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.' ").

It is significant that the pamphlet is prepared and distributed by the government. We have previously held that the voters' pamphlet "constitutes a limited public forum but . . . that a lower level of scrutiny attaches to this classification. . . . " *Kaplan v. County of Los Angeles*, 894 F.2d 1076, 1079 (9th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 2590, 110 L.Ed.2d 271 (1990). Treating the pamphlet as a limited forum where the government can regulate the speech involved is valid. In *White v. City of Norwalk*, 900 F.2d 1421 (9th Cir. 1990), we held that restrictions on speakers at town council meetings were valid, when limited to disturbing and impeding speech that was out of

order or irrelevant: "Principles that apply to random discourse may not be transferred without adjustment to this more structured situation." *Id.* at 1425. The Supreme Court has recognized the legitimacy of creating such forums for limited topics. *See City of Madison School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 175 n. 8, 97 S.Ct. 421, 426 n. 8, 50 L.Ed.2d 376 (1976) ("Plainly, public bodies may confine their meetings to specific subject matter and may hold nonpublic sessions to transact business."); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567 (1985) (public forum may be created by government designating "place or channel of communication . . . for the discussion of certain subjects"). In creating the voters' pamphlet the government created a limited subject forum intended to provide clear and basic statements able to assist the voter in the exercise of her franchise. Retaining the power to remove certain statements ensures that the speech will properly satisfy the limited subject forum and ensures that the forum will not be abused. The statutes adequately identify the scope of discussion acceptable in this forum. The statutes look for statements that are "false," "misleading," and "inconsistent with the requirements of this chapter," criteria which, although requiring analysis of the content of the challenged statements and the ballot measures, do not distinguish between viewpoints.

In analyzing these statutes it is helpful to remember the core values and concerns of first amendment protection, embodied and recognized in a passage from *New York Times v. Sullivan*:

> Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.

376 U.S. 254, 270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964). *New York Times v. Sullivan* considered three main factors in its analysis. First, it recognized, as demonstrated in the above quote, the first amendment interest in wide-open debate. Second, it considered the government interest in the challenged restriction, which in the present case is significant. Third, it considered the deterrent nature of the challenged regulation, which in the present case is non-existent. Following this pattern we conclude that the challenged statutes are constitutional.

The voters pamphlet does not *suppress* protected expression or in any serious way limit the debate of public issues. The statute does not prohibit the deleted statements generally, but only in the pamphlet. The authors do not have an independent constitutional interest in publishing false, misleading, or inconsistent statements in the pamphlet. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974) ("[T]here is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues.").

The present restrictions are a least restrictive alternative to achieve the state's significant interests. *See United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d

672 (1968); *cf. Buckley v. Valeo*, 424 U.S. 1, 28, 96 S.Ct. 612, 639, 46 L.Ed.2d 659 (1976) ($1000 campaign contribution limit "focuses precisely on the problem of large campaign contributions . . . while leaving persons free to engage in independent political expression, to associate actively"). The burden in all instances is on the party challenging the statement, who must satisfy a level of clear and convincing proof that the statements are "false," "misleading," or "inconsistent." *See generally* Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L.Rev. 11 (1981) (concluding that placing burden on speaker to pursue determination of constitutionality is a major factor in self-censorship). To the extent it may be difficult to determine what is "false," "misleading," and "inconsistent" for political speech, that is reflected in and taken into account by the standard of proof required.

Moreover, there can hardly be a proper purpose in conveying demonstrably false, misleading or inconsistent[1] information to the voters by means of the pamphlet. *See Gertz v. Welch*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1976). If proponents and candidates insist on foisting that kind of information on the voters, they surely do not

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[1] We note that as to "inconsistent" there may be some concern, since the California Court of Appeals said this means material which is "not clearly germane. . . . " *Patterson v. Board of Supervisors*, 202 Cal.App.3d 22, 31, 248 Cal.Rptr. 253 (1988). From the general thrust of that court's opinion and from the burden of proof set forth in the statutory language, we believe that was a mere inadvertent misplacing of a modifier and that what the court meant was "clearly *not* germane." We are confident that the California Supreme Court would so interpret the language of the statues, and we adopt that reading.

have the right to the government's help in carrying out their enterprise.

The challenged statutes are a reasonable manner of regulation, narrowly tailored to serve a significant government interest, while leaving open more than ample alternative channels of communication.

b. Immediate Appellate Review Is Not Necessary

Geary argues that the lack of immediate appellate review of the decision to delete material renders the statutes unconstitutional. We disagree. The statutes satisfy the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965): 1) the burden of proving that the material is within the regulation must rest with the censor; 2) the reviewing process must not effectuate a final censoring via delay; 3) the procedure must assure a prompt and final judicial decision, "because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression. . . . " *Id.* at 58, 85 S.Ct. at 738. The appellate review required in *Nationalist Socialist Party v. Village of Skokie*, 432 U.S. 43, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977), is not followed in all cases. Such review is not required here, because unlike *Skokie*, there is a hearing on the merits at the first instance of injunction. *Cf. Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S.Ct. 2199, 2207, 81 L.Ed.2d 17 (1984) (upholding protective order, "prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny," noting that paper

could still publish information if gained through other means).

II. Candidate Statements: Section 10012

Section 10012 prohibits candidates from making reference in their candidate statements, published in the voters' information pamphlet, to "party affiliation" or to "membership or activity in partisan political organization." Enforcement is through section 10013.5. Our analysis of this section parallels that of the ballot sections above.

While the restriction implicates first amendment interests it does so to preserve the scope of a limited subject forum created by the government to aid in the establishment of a nonpartisan government structure. The government may regulate speech in a limited public forum to preserve the usefulness of the forum in accomplishing the purpose for which it was created. *See City of Madison v. Wisconsin Employment Relations Comm'n,* 429 U.S. 167, 175 n. 8, 97 S.Ct. 421, 426 n. 8, 50 L.Ed.2d 376 (1976); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,* 473 U.S. 788, 818-19, 105 S.Ct. 3439, 3457-58, 87 L.Ed.2d 567 (1985) (Blackmun, J., dissenting). The restriction advances the government interest in establishing a non-partisan system of government with the aid of a limited public forum in a narrowly tailored manner.

The recent en banc decision, in the related case of *Geary v. Renne,* 911 F.2d 280 (9th Cir.1990), does not require a different conclusion. In fact, that decision supports our result.

The en banc decision invalidated section 6(b) of Article II of the California Constitution. Section 6(b) prohibits political parties from supporting, endorsing, or opposing a candidate for nonpartisan office. The section 6(b) prohibition is significantly different from that in section 10012, in that section 6(b) was a blanket prohibition: it prohibited all support, endorsement or opposition. In this way it is very much like the statutes in the cases we distinguished in our discussion regarding the ballot statements. *See, e.g., Brown v. Hartlage,* 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982), *Vanasco v. Schwartz,* 401 F.Supp. 87 (E.D.N.Y.1975), *aff'd,* 423 U.S. 1041, 96 S.Ct. 763, 46 L.Ed.2d 630 (1976); *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974); *Mills v. Alabama,* 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484 (1966).

Noting that the ban is total, the en banc panel reported with approval that

> [a]ccordingly, the district court below specifically found that the State could adequately safeguard the interests § 6(b) was designed to protect by less drastic means, including provision for nonpartisan methods of nominating candidates for local and judicial offices and *controls on partisan activities of the candidates.*

Geary, 911 F.2d at 285 (emphasis added). We find the restriction on candidate statements a less drastic, valid control on partisan activity. The en banc decision drops a footnote after the above quoted material recognizing some other valid regulations used to preserve the nonpartisan character of local elections:

> In fact, the California Elections Code features several provisions designed to preserve

> the nonpartisan character of local and judicial elections. To begin with, we note that Section 37 of the Code explicitly forbids party participation in the nomination of candidates for nonpartisan office. . . . In addition, the Code contains provisions stating that declarations of candidacy and other nomination papers may not refer to party affiliation (§ 6401.5); the name of the party to which a candidate for nonpartisan office belongs may not appear on the ballot (§ 10200.5); a voter may cast his ballot for a candidate for nonpartisan office without regard to party affiliation (§ 10214); and partisan and nonpartisan offices are to be listed in separate columns on the ballot form (§ 10207).

Id. at 285, n. 4. Section 10012's restriction, like these controls, is limited and aids in the establishment of the nonpartisan governmental structure chosen by California in a narrowly tailored manner.

Since the restriction serves the government's interest in retaining the limited subject matter purpose of its limited public forum in a least restrictive manner, we hold that section 10012 does not violate the first or fourteenth amendment.

CONCLUSION

We hold that sections 3795, 5025, 10012 and 10013.5 of the California Elections Code do not violate the first amendment. The district court is AFFIRMED IN PART and REVERSED IN PART.

APPENDIX C

Bob GEARY, Robert Silvestri; Dennis Mark; Melissa Gundrun; Wayne Johnson; David Soule; Max Woods; Peter Johnson; Robert Gerbert; Election Action; Terence Faulkner; Sudi Trippet, Plaintiffs-Appellees,

v.

Louise RENNE, San Francisco City Attorney; Diane Feinstein; Jay Patterson; San Francisco Board of Supervisors; City and County of San Francisco; San Francisco Registrar of Voters, Defendants-Appellants.

Dennis MARK; Bob Geary; Robert Silvestri; Terence Faulkner; Max Woods; Alexa Smith, Plaintiffs-Appellees,

v.

Michelle CORWIN, Acting Registrar of Voters; Louise Renne, San Francisco City Attorney; City and County of San Francisco, Defendants-Appellants.

Dennis MARK; Bob Geary; Robert Silvestri; Terence Faulkner; Max Woods; Alexa Smith, Plaintiffs-Appellants,

v.

Michelle CORWIN; Louise Renne, San Francisco City Attorney; City and County of San Francisco, Defendants-Appellees.

Bob GEARY, Robert Silvestri; Dennis Mark; Melissa Gundrun; Wayne Johnson; David Soule; Max Woods; Peter Johnson; Robert Gebert; Election Action; Terence Faulkner; Sudi Trippet, Plaintiffs-Appellants,

v.

Louise RENNE, San Francisco City Attorney; Diane Feinstein, Mayor; Jay Patterson; San

Francisco Board of Supervisors; City and County of San Francisco; San Francisco Registrar of Voters, Defendants-Appellees.

Nos. 89-15601, 89-15603, 89-15719 and 89-15720.

United States Court of Appeals, Ninth Circuit.

Jan. 30, 1991.

Arlo Hale Smith, San Francisco, Cal., for plaintiffs-appellees-cross-appellants.

Randy Riddle, Deputy City Atty., San Francisco, Cal., for defendants-appellees.

Pebbles Trippet, San Francisco, Cal., in pro. per., for plaintiff-appellee-cross-appellant.

Prior Report: 9th Cir., 914 F.2d 1249.

Before: GOODWIN, Chief Judge, BROWNING, WALLACE, HUG, TANG, SCHROEDER, FLETCHER, FARRIS, PREGERSON, ALARCON, POOLE, D.W. NELSON, CANBY, NORRIS, REINHARDT, BEEZER, HALL, WIGGINS, BRUNETTI, KOZINSKI, NOONAN, THOMPSON, O'SCANNLAIN, LEAVY, TROTT, FERNANDEZ, RYMER, and T.G. NELSON, Circuit Judges.

ORDER

Upon the vote of a majority of nonrecused regular active judges of this court, it is ordered that this case be reheard by the en banc court pursuant to Circuit Rule 35-3.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BOB GEARY, et al.,
Plaintiffs,
vs.
LOUISE RENNE, San Francisco City Attorney, et al.,
Defendants.

NO. C 87 4724 AJZ

DENNIS MARK, et al.,
Plaintiffs,
vs.
MICHELLE CORWIN, Acting Registrar of Voters, et al.,
Defendants.

NO. C 88 3483 AJZ

ORDER

(Filed Apr. 28, 1989)

These related cases arise out of a dispute regarding the San Francisco Voter's Pamphlet. Plaintiffs challenge the constitutionality of three sections of the California Elections Code which permit voters or the city or county clerk to file suit to delete from the pamphlet statements deemed to be false, misleading or inconsistent with the requirements of the Elections Code.[1] In addition,

[1] Plaintiffs in *Geary v. Renne* challenge §§ 3795 and 5025, which address pamphlet statements concerning initiatives; plaintiffs in *Mark v. Corwin*, challenge § 10013.5, which addresses pamphlet statements concerning candidates.

plaintiffs in *Mark v. Corwin* challenge the constitutionality of Elections Code § 10012, which permits the clerk to delete, from statements filed by candidates for nonpartisan elective office, references to the candidate's party affiliation or membership or activity in partisan political organizations.[2] Plaintiffs and defendants in both cases now move for summary judgment.[3]

FACTS

The parties agree on the facts in these cases. The plaintiffs have submitted candidate statements which were amended by the clerk, and pamphlet statements which were amended by court order, pursuant to the statutes which plaintiffs challenge in these related cases.

On March 7, 1988, before these two cases were related, the court tentatively granted summary judgment

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Plaintiffs in *Geary v. Renne* also challenge the constitutionality of a recent amendment to the California constitution which prohibits parties from endorsing candidates in non-partisan elections. The court has already ruled on this claim.

[2] The statute merely provides that a candidate may prepare a statement, which shall be filed in the office of the clerk, and that the statement may not include partisan information. The parties agree, however, that the statute provides the clerk with authority to delete partisan references from candidate statements.

[3] In *Geary*, the parties seek summary judgment on the first cause of action, which challenges §§ 3795 and 5025 (pamphlet statements regarding initiatives); in *Mark*, the parties seek summary judgment on the first cause of action, which challenges § 10012 (candidate statements) and the second cause of action, which challenges § 10013.5 (pamphlet statements regarding candidates).

in favor of plaintiffs in *Geary*, declaring §§ 3795 and 5025 unconstitutional. Although the court did not issue a written order, defendants moved for reconsideration.

On April 14, 1988, the court considered defendants' motion for reconsideration. The court was informed by the parties that the California Court of Appeal was considering a constitutional challenge to §§ 3795 and 5025. Because a decision by the California court applying the statutes in a sufficiently limited manner could cure the statutes' constitutional deficiencies, the court decided to take defendants' motion under submission in order to await the outcome of the California court's decision. Reporter's Transcript of April 14, 1988 hearing at 4-6.

On June 14, 1988, the California Court of Appeal upheld §§ 3795 and 5025. *See Patterson v. Board of Supervisors*, 248 Cal. Rptr. 253 (1988). On September 14, 1988, the California Supreme Court denied review.

DISCUSSION

The summary judgment motions currently pending concern three claims in these two related cases. They will be discussed separately.

A. *Geary* Claim #1: challenging §§ 3795, 5025

Plaintiffs contend that §§ 3795 and 5025 are invalid because they are not narrowly drawn to serve a compelling government interest. This contention has merit.

In order for these statutes to survive plaintiffs' constitutional challenge, defendants must demonstrate that the statutes are narrowly tailored to achieve a compelling

government interest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).[4] Preserving the integrity of the electoral process is a compelling government interest. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788 (1977). Moreover, in a limited public forum such as the Voter's Pamphlet,[5] "the need to confine expressive activity on the property to that which is compatible with the intended uses of the property will be a compelling interest that may justify distinctions made between speakers." *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 819 (1984) (Blackmun, J., dissenting).

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[4] Defendants contend in their papers that, because the pamphlet is a "limited-use public forum," the statutes may be upheld on the basis of a lesser standard than the usual standard of strict scrutiny. Defendants rely chiefly on *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 573-76 (9th Cir. 1984) (applying a lesser standard than strict scrutiny where officials dedicate a public facility to particular forms of artistic expression), which does not provide this court with sufficient authority to examine with less than strict scrutiny the suppression of political expression involved in these two related cases.

Plaintiffs' references to "overbreadth" and "prior restraint" in connection with §§ 3795 and 5025 are likewise inappropriate. "Overbreadth" doctrine is distinct from strict scrutiny and inapplicable to this case. "Prior restraint" exists when a statute forecloses speech prior to a judicial hearing, *see, e.g., Southeastern Promotions v. Conrad*, 420 U.S. 546, 553 (1975), but §§ 3795 and 5025 require such a judicial hearing.

[5] A limited public forum may be designated "for use by certain speakers or for the discussion of certain subjects." *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 802 (1984).

As written, however, the statutes are not narrowly tailored to achieve these interests. They broadly permit the excision of material which is "false, misleading, or inconsistent with the requirements of this chapter." Cal. Elec. Code §§ 3795, 5025 ("chapter" details procedural requirements for elections). It is on the basis of this ambiguous phrase that plaintiffs' materials were amended.

Although the California Court of Appeal, in its June 14, 1988 decision, applied a narrow gloss to part of the statutes, the Court's opinion leaves the rest of the statutes untouched. In upholding the constitutional validity of §§ 3795 and 5025, the Court of Appeal noted that the statutes contain a number of safeguards to limit the government's restrictions on the applicable protected rights of speech. *Patterson*, 248 Cal. Rptr. at 259. Among those safeguards are the "definitive restrictions imposed" which

> are . . . carefully tailored to promote the established purpose of the limited public forum. The "essential purpose of [ballot argument] provisions is to give the voters information concerning the measures on the ballot." *Submitted arguments which are not clearly germane to the ballot proposition, whether in support or opposition,* are inconsistent with the basic purposes of the limited public forum specifically established by the legislation.

Id. (emphasis supplied) (quoting *Hart v. Jordan*, 14 Cal.2d 288, 292 (1939)).

In applying §§ 3795 and 5025, therefore, California courts limit the ambiguous phrase "inconsistent with the

requirements of this chapter" to those arguments "which are not clearly germane to the ballot proposition." Construed in such a limited fashion, this phrase in the statutes is narrowly tailored to achieve the interests in preserving the integrity of the electoral process and in "confin[ing] expressive activity . . . to that which is compatible with the intended uses of the [limited public forum]." *See Cornelius*, 473 U.S. at 819.

However, the Court of Appeal did not have an opportunity to construe the phrase "false [or] misleading." The government is not entitled to proscribe all false statements in the context of the election process. Rather, the Supreme Court has determined that the same standard applicable to libel actions – the malice standard enunciated in *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964) – should apply to regulations which concern electoral speech.

In *Brown v. Hartlage*, 456 U.S. 45 (1982), the Court determined that a campaign law prohibiting candidates from promising to give something of value or political support in consideration for a person's vote could not be applied against a candidate unless there was evidence that the candidate acted with knowing or reckless disregard for the truth. As the Court reasoned:

> Although the state interest in protecting the political process from distortions caused by untrue and inaccurate speech is somewhat different from the state interest in protecting individuals from defamatory falsehoods, the principles underlying the First Amendment are paramount. Wherever compatible with the underlying interests at stake, under the regime

> of that Amendment, 'we depend for . . . correction not on the conscience of judges and juries but on the competition of other ideas.'

Id. at 61 (quoting *Gertz v. Welch*, 418 U.S. 323, 339-40 (1974)).

In *Vanasco v. Schwartz*, 401 F. Supp. 87, 92 (E.D.N.Y. 1975), *aff'd*, 423 U.S. 1041 (1976), a New York court held that a campaign law proscribing various types of misrepresentations by political candidates could not be applied against a candidate without proof of actual malice. The court observed that the *New York Times* decision and other related cases "emphasize the necessity for statements concerning public issues to command a high degree of constitutional protection so that debate may be 'uninhibited, robust, and wide-open.' " *Id.* at 92. (citation omitted in original).

Under the standard set out in *Brown* and affirmed by the Court in *Vanasco*, the government may not regulate false political speech unless such speech violates the "actual malice" standard set forth in the *New York Times* decision. Thus, §§ 3795 and 5025 may only exclude statements made with knowledge of falsity or with reckless disregard for the truth. In order to respond to all other false or misleading statements, the "preferred First Amendment remedy [is] 'more speech, not enforced silence.' " *Brown*, 456 U.S. at 61 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).[6]

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[6] Defendants assert that the *New York Times* standard only applies to cases, such as *Brown* and *Vanasco*, in which monetary or criminal penalties are imposed. Because §§ 3795 and 5025 do

Accordingly, as to the first cause of action in *Geary v. Renne*, plaintiffs' motion is granted and defendants' motion is denied.

B. *Mark* Claim #1: challenging § 10012

Plaintiffs contend that § 10012 is invalid because it authorizes an administrative official to impose a prior restraint on speech without adequate procedural safeguards. This contention has merit.

In order to be constitutionally valid,

> a scheme of administrative censorship must: place the burdens of initiating judicial review and of proving that the material is unprotected expression on the censor; require "prompt judicial review" – a final judicial determination on the merits within a specified, brief period – to prevent the administrative decision of the censor from achieving an effect of finality; and limit to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of the final judicial determination.

Blount v. Rizzi, 400 U.S. 410, 417 (1971) (citing *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965)). Section 10012 merely prohibits candidates' statements from including "the party affiliation of the candidate, []or membership or activity in partisan political organizations." It does not

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not provide for such penalties, they conclude, the *New York Times* standard does not apply here. Defendants fail, however, to provide any direct authority for this proposition. Nor does the relevant case law support their argument.

provide for any of the procedures required by *Freedman* before such partisan references may be deleted by the city or county clerk. Accordingly, the statute is constitutionally deficient.

Defendants assert that *Freedman* only applies to statutes which invest administrative officials with unbridled censorial discretion, and not to statutes which merely involve the exercise of objective, ministerial decisions, and that § 10012 requires the clerk to perform a ministerial, not discretionary task. This argument fails. The clerk's obligation to determine whether a candidate's group affiliation is with a "partisan political organization" is not ministerial, but requires the exercise of discretion in distinguishing partisan from non-partisan organizations.

Alternatively, defendants suggest that the court construe § 10012 to require the use of judicial procedure set out in § 10013.5. However, this court has no jurisdiction to issue a limiting construction regarding a state law. *United States v. Thirty-seven Photographs*, 402 U.S. 363, 369 (1971).

Accordingly, as to the first cause of action in *Mark v. Corwin*, plaintiffs' motion is granted and defendants' motion is denied.

C. *Mark* Claim #2: challenging § 10013.5

Although these two cases were not related when the court considered the motion for summary judgment and motion for reconsideration in *Geary*, § 10013.5 is identical

to §§ 3795 and 5025 for purposes of these cases. Moreover, the parties' papers in the currently pending cross-motions treat them identically. Therefore, as to the second cause of action in *Mark v. Corwin*, plaintiffs' motion is granted and defendants' motion is denied for the same reasons as apply to the first cause of action in *Geary v. Renne*.

Accordingly,

IT IS HEREBY ORDERED that:

1. Plaintiffs' motion for summary judgment is granted and defendants' motion for summary judgment is denied.

2. Defendants' motion for reconsideration as to the first cause of action in *Geary v. Renne*, which the court took under submission pending the outcome of the state court action, *Patterson v. Board of Supervisors*, is also denied.

Dated: April 28, 1989

ALFONSO J. ZIRPOLI
Alfonso J. Zirpoli
United States District Judge.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BOB GEARY, et al.,
Plaintiffs,
vs.
LOUISE RENNE, San Francisco City Attorney, et al.,
Defendants.

NO. C 87 4724 AJZ

DENNIS MARK, et al.,
Plaintiffs,
vs.
MICHELLE CORWIN, Acting Registrar of Voters, et al.,
Defendants.

NO. C 88 3483 AJZ

JUDGMENT

(Filed Apr. 28, 1989)

In accordance with this court's orders dated October 27, 1987, April 27, 1988, and April 28, 1989,

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of plaintiffs.

Plaintiffs shall recover taxable costs.

Dated: April 28, 1989

ALFONSO J. ZIRPOLI
Alfonso J. Zirpoli
United States District Judge

APPENDIX E

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In Pro. Per.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DENNIS MARK, BOB GEARY, ROBERT SILVESTRI, TERENCE FAULKNER, MAX WOODS, and ALEXA SMITH,

Plaintiffs,

vs.

MICHELLE CORWIN, Acting Registrar of Voters; LOUISE RENNE, City Attorney; and CITY AND COUNTY OF SAN FRANCISCO,

Defendants.

_____/

C88 3483 EFL

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF FOR VIOLATION OF CIVIL RIGHTS

(Filed Aug. 30, 1988)

Plaintiffs allege for a cause of action as follows:

GENERAL ALLEGATIONS

1. Plaintiffs Dennis Mark, Bob Geary, Terence Faulkner, Max Woods and Alexa Smith and Robert Silvestri are registered voters of the City and County San Francisco (hereafter "City and County").*

2. Defendant Michelle Corwin is Acting Registrar of Voters of the City and County, and is sued herein in her official capacity. As Registrar, Corwin is responsible for conducting elections in the City and County, publishing voter pamphlets issued on behalf of the City and County, and enforcing election laws of the City and County and the State of California.

3. Defendant City and County is a municipal corporation of the State of California.

4. Defendant Louise Renne is City Attorney of the City and County, and is sued herein in her official capacity. As City Attorney, Ms. Renne is responsible for representing other officials of the City and County in actions commenced by or against them.

5. In connection with each election held in the City and County, said City and County mails a voter pamphlet to all registered voters. Said pamphlet contains candidate statements filed by candidates seeking City and County offices, or special district offices voted on within said City and County. The Registrar of the City and County is responsible for preparing and publishing the voter pamphlet.

6. Plaintiffs Mark, Faulkner, Woods and Silvestri are presently members of the Republican Committee of San Francisco ("Republican Committee"), while plaintiffs

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* [Typographical errors in the original document have not been corrected in this Appendix.]

Geary and Smith presently serve as members of the San Francisco Democratic County Central Committee (hereafter "Democratic Committee"). Plaintiffs have each held such central committee memberships since the following dates: Faulkner – 1974; Woods – 1974; Geary – 1980; Mark – 1986; Silvestri-1982; Smith-1988.

7. As registered voters, plaintiffs an each of them desire to read all candidate statements filed with the Registrar in unedited, uncensored, unabridged form.

8. This court has jurisdiction pursuant to 28 U.S.C. sections 1331 and 1343.

9. In doing or threatening to do all of the acts alleged herein, defendants have been, or threaten to be, acting under color of state law.

10. Plaintiffs incorporate by reference each of the foregoing allegations into the following causes of action.

FIRST CAUSE OF ACTION

11. In connection with the following general elections, plaintiffs Silvestri, Geary and Mark have been candidates for the office of BART Director: Silvestri- 1982; Geary - 1982; Mark - 1988. In connection with said elections, said plaintiffs have submitted candidate statements to the San Francisco Registrar of Voters, which candidate statements were accepted for filing by the Registrar. Each of said statements contained the following material as part of the statement:

a. The statements of Silvestri, Geary and Mark each contained references to the candidate's service on the Republican or Democratic Committee.

b. The statement submitted by Mark contained a sentence requesting that voters support an initiative measure to limit service of San Francisco Supervisors to two terms.

12. After filing by Silvestri and Geary of the candidate statements referenced in paragraph 11, the Registrar of Voters, without notice to or consent of, said plaintiffs, deleted the material described in paragraph 11a from said candidate statements, and printed such statements in the voter pamphlet in such altered form. Said deletion was made by the Registrar without obtaining any prior Court order, or even commencing any action to obtain authorization of such deletion.

13. After filing by Mark of the candidate statement described in paragraph 11, Corwin notified Mark in writing of her intention to delete the material described in paragraph 11 a and b without the consent of Mark, and without obtaining any court order authorizing such deletion, or even commencing an action to request such authorization. On or about August 26, 1988, Corwin restated said intention in a telephone conversation with plaintiff Faulkner. Unless restrained by order of this court, Corwin threatens to edit Mark's candidate statement by deleting the material described in paragraph 11 a and b, and publish same in said censored form, without consent of Mark, and without obtaining any court order authorizing such deletion, or even commencing an action to seek such authorization.

14. Defendants Corwin and City and County have claimed, and now do claim, the right to delete material from candidate statements, including references to

elected party offices held by candidates, without consent of the candidates, and without obtaining any prior court order, or even commencing any action seeking authorization for such censorship, pursuant to certain laws of the State of California, and City and County, including Elections Code Section 10012.

15. Unless restrained by order of this court from doing so, said defendants threaten to administratively censor candidate statements as described in paragraphs 12, 13, and 14, in connection with future elections.

16. Plaintiffs and each of them have been injured by the conduct of defendants described above as registered voters who desire to read candidate statements in their unabridged, unedited, uncensored form. Plaintiffs and each of them will be injured by the threatened conduct of defendants described above, as registered voters who desire to read candidate statements submitted in connection with future elections in unedited, unabridged, uncensored form.

17. An actual controversy now exists in that:

a. Plaintiffs contend that California Elections Code Section 10012 and any other state or local law permitting the Registrar of Voters to delete material from candidate statements, without consent of the candidate, and without seeking or obtaining a prior court order authorizing such deletion, is violative of plaintiffs rights of freedom of sppech and of the press under the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. section 1983, in that said statutes permit imposition of prior restraints on free expression without placing the burden on the party seeking to impose such restraint

of obtaining a prior court order authorizing such censorship in a proceeding in which said party bears both the burden of proceeding and of proof, permits restraint of constitutionally-protected statements of opinion and fact by candidates for public office, and imposes unconstitutionally vague and overbroad standards regulating expression in a public forum.

b. Defendants dispute said contentions.

18. Due to the past and threatened conduct of defendants in administratively censoring candidate statements, plaintiffs have suffered and will suffer irreparable injury in that they will be denied their constitutional and civil rights of free speech and freedom of press, including the right to hear and read candidate statements in their uncensored form, so that plaintiffs cannot fairly be compensated in damages, and are without adequate remedy at law.

SECOND CAUSE OF ACTION

19. Plaintiffs incorporate by reference paragraph 16, above.

20. In connection with the 1986 general election Thomas Spinosa was a candidate for BART Director, and submitted a candidate statement to the San Francisco Registrar of Voters, which was accepted for filing. Said statement contained references to Spinosa's service on the Republican Committee, as well as the Republican State Committee. After said statement was filed, an action to censor other portions of said statement was commenced against Spinosa and the Registrar of Voters, pursuant to

Elections Code Section 10013.5. In connection with said litigation, defendants Renne and the Registrar obtained a court order directing deletion of the references to Spinosa's service on the Republican Committee, and the Republican State Central Committee.

21. Defendants Corwin, City and County, and Renne claim the right to obtain court orders for deletion of material from candidate's statements, pursuant to state and City and County laws, including Elections Code Section 10013.5. The latter statute, on its face, authorizes such censorship, at least with respect to material deemed to be "false", "misleading" or "inconsistent".

22. Unless restrained from doing so by order of this court, said defendants trheaten to seek and obtain censorship orders pursuant to said statutes, including California Elections Code Section 10013.5.

23. An actual controversy now exists in that:

a. Plaintiffs contend that California Elections Code Section 10013.5 and any other state or local law permitting defendants to obtain court orders authorizing deletion of material from candidate's statements is violative of plaintiff's rights of freedom of speech and freedom of the press under the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. 1983, in that said statutes permit imposition of invalid prior restraints on free expression, permit restraint of constitutionally-protected statements of opinion and fact by candidates for public office, and impose unconstitutionally vague and overbroad standards regulating speech in a public forum.

b. Defendants dispute said contentions.

19. Due to the past and threatened conduct of defendants in seeking court orders for censorship of candidate statements, plaintiffs have suffered and will suffer irreparable injury in that they will be denied their constitutional and civil rights of free speech and freedom of the press, including the right to hear and read candidate statements in their uncensored form, so that plaintiffs cannot fairly be compensated in damages, and are without adequate remedy at law.

WHEREFORE, plaintiffs pray for judgment as follows:

1. For a judicial declaration that Elections Code Section 10012 is unconstitutional and violative of the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. 1983, insofar as said statute authorizes administrative censorship of candidate statements.

2. For a judicial declaration that Elections Code Section 10013.5 is unconstitutional and violative of the First and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. 1983.

3. For a temporary restraining order, preliminary injunction, and permenant injunction restraining defendants from enforcing Election Code Section 10012, insofar as said statute authorizes administrative censorship of candidate statements.

4. For a temporary restraining order, preliminary injunction and permanent injunction restraining defendants from commencing or prosecuting any action brought pursuant to Elections Code Section 10013.5.

5. For costs, including reasonable attorney fees, and such other and further relief as the court may deem just and proper.

DATED: August 29, 1988

ARLO HALE SMITH
Attorney for Plaintiffs

TERENCE FAULKNER
In Pro. Per.

APPENDIX F

City and County of San Francisco:
Office of City Attorney

Dennis Aftergut
Chief Assistant
City Attorney
(415) 554-4213

May 24, 1993

Cathy A. Catterson, Clerk
United States Court of Appeals for the Ninth Circuit
121 Spear Street
P.O. Box 193939
San Francisco, CA 94119-3939

RE: *Geary v. Renne* (No. 89-15601)
Mark v. Corwin (No. 89-15603)

Dear Ms. Catterson:

Pursuant to the court's May 10, 1993 order, appellants Louise H. Renne, City and County of San Francisco ("the City"), *et al.*, submit this letter brief on the applicability of *Renne v. Geary*, 111 S.Ct. 2331 (1991), to this case. Under *Renne*, all three claims here are nonjusticiable.

A. APPELLEES LACK STANDING TO CHALLENGE §§3795 AND 5025.

Appellees' challenge to California Elections Code §§3795 and 5025 arises from the first claim for relief in

Geary v. Renne.[1] *See Geary* complaint, ER (cross-appeal) 1-5. That claim alleges that in connection with the November 3, 1987 election, five of the ten plaintiffs – Geary, Faulkner, Silvestri, Woods and Mark – submitted ballot arguments for publication in the Voter's Pamphlet. *Id.*, ¶13, ER (cross-appeal) 3.[2] Pursuant to §§3795 and 5025, the City obtained court orders deleting portions of these arguments. *Id.*, ¶15, ER (cross-appeal) 4.

Significantly, however, the district court *dismissed* all five plaintiffs who had submitted ballot arguments for the November 1987 election. *See* CR 21 (a copy of the order is attached as Exh. B). The district court did so because the five plaintiffs were "parties . . . in *Patterson v. Board of Supervisors* [202 Cal.App.3d 22 (1988)]." CR 19, 10/20/87 Transcript, 2:23-25 (attached as Exh. C.) The dismissal was not appealed. Thus, the remaining appellees are all "listeners"; that is, "voters who desire to read ballot arguments in their uncensored form." *Geary* complaint, ¶17, ER (cross-appeal) 4.[3]

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[1] All statutory references are to the California Elections Code. Copies of the statutes are attached as Exh. A.

[2] The complaint also alleges that plaintiffs Geary, Silvestri and Faulkner submitted ballot arguments for the *June* 1987 election. *Id.*, ¶12. This dispute, however, was not live when the suit was filed in *September* 1987. *See* §C below.

[3] Appellees suggest that Sudi Trippet and Election Action also have standing "as ballot argument submitters who have faced censorship. . . . " Appellees' May 21, 1993 letter-brief, p.2. The complaint includes no such allegation. Ms. Trippett's September 22, 1987 declaration states that she "regularly" submits ballot arguments for Election Action, but does not state that she did so in the election at issue here. *See* CR 6 (copy attached as Exh. D); *see also* discussion in §C below. Nor does the declara-

This fact puts the present case on all fours with *Renne v. Geary*, 111 S.Ct. 2331. At issue there was California's ban on endorsements by political parties in nonpartisan elections. Cal. Const., Art. II, §6(b). The plaintiffs challenged the San Francisco Registrar's practice of deleting references to party endorsements in candidates' statements in the Voter's Pamphlet. 111 S.Ct. at 2335. But there were no actual candidates before the Court and no political parties; the plaintiffs were voters and individual members of the parties' central committees. *Ibid.* (The Court rejected the claim that individual members could speak for the committees as a whole. *Id.* at 2338.) Therefore, the only basis for the plaintiffs' claims was, as in this case, the right to receive information. *Id.* at 2337.[4]

Notwithstanding *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the *Renne* Court held that these "listeners" lacked standing. The Court first expressed doubt that the injury alleged would have been redressed by the relief sought. 111 S.Ct. at 2337. More importantly here, the Court then questioned the rights of the "listeners" there to "stand in the shoes" of actual speakers:

> "Nor is it clear, *putting aside our concerns about redressability*, that the committee members have

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tion state that her arguments have ever been amended under §3795 or §5025. Trippett has not met her burden of showing a justiciable controversy. *Warth v. Seldin*, 422 U.S. 490, 501-502 (1975).

[4] The parallel between *Renne* and this case is not coincidental. *Renne* involved the third claim for relief in the same complaint whose first claim for relief is at issue here. ER (cross-appeal) 8-11.

> third party standing to assert the rights of candidates, since *no obvious barrier exists that would prevent a candidate from asserting his or her own rights. See Powers v. Ohio*, 499 U.S. ___, ___, 111 S.Ct. 1364, 1370 (1991)." *Renne*, 111 S.Ct. at 2338 (emphasis added).

Similarly in this case, "no obvious barrier exists that would prevent an [author of a ballot argument] from asserting his or her own rights." *Ibid.* Indeed, the actual authors of the ballot arguments here *did* assert their rights. The sole reason they are absent is the choice they made to pursue their appeal first in state court. Obviously, this is not a "barrier" that extends to other speakers.

Moreover, there is nothing in the statutes under attack that deters would-be authors of ballot arguments. Like the challenged provision in *Renne*, and unlike the regulation in *Va. Pharmacy*, §§3795 and 5025 carry no criminal or civil penalties and may only be enforced through court order. *See Renne*, 111 S.Ct. at 2339. As a result, concerns about "chilling" expression are not present here. *See Mendelsohn v. Meese*, 695 F.Supp. 1474, 1479 (S.D.N.Y. 1988) (Where "listeners" are granted standing, it is "because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.")

As plaintiffs, appellees have the burden of establishing standing. *Renne*, 111 S.Ct. at 2336. That burden is "substantially more difficult" in cases such as this, where the plaintiffs are not themselves the objects of the challenged governmental action. *See Allen v. Wright*, 468 U.S.

737, 758 (1984). Appellees have failed to carry this burden, being unable to show why the constitutional interests at issue are not more suitably presented in a case with actual speakers. *See Renne*, 111 S.Ct. at 2338; *see also, Norwood v. Slammons*, 788 F.Supp. 1020, 1030 (W.D.Ark. 1991); *compare, e.g., Lamont v. Postmaster General*, 381 U.S. 301 (1965) (foreign nationals mailing communist literature from abroad unlikely to challenge restrictions on such literature); and *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (publishers of legally obscene material unlikely to challenge postal restrictions on such material).

The wisdom of awaiting a case with actual speakers is particularly apparent in the context of this case. Standing reflects a basic concern; namely, that parties seeking federal relief have a particularized, "personal stake" that enables them "authoritatively to present" the case. *Schlesinger v. Reservists To Stop The War*, 418 U.S. 208, 221 (1974). "Such authoritative presentations are an integral part of the judicial process, for a court must rely on the parties' treatment of the facts and claims before it develops its rules of law." *Ibid.*

In this case, the key issue to be "authoritatively presented" involves the nature of the relevant forum. *See* Appellants' Brief on *Clark v. Burleigh*, filed May 10, 1993. But "a forum is defined by its speakers, not its listeners." *Clark v. Burleigh*, 4 Cal.4th 474, 490 (1992). Without an actual author of a ballot argument, this court has no party before it possessing the personal interest and status – those of a speaker – that define the central issue in the case. Given the availability of actual speakers, the court

should "[p]ostpon[e] consideration of the questions presented, until a more concrete controversy arises. . . . " *Renne*, 111 S.Ct. at 2339.[5]

B. APPELLEES' CHALLENGE TO §§10012 AND 10013.5 IS NOT REDRESSABLE.

Under *Renne*, a party seeking to invalidate one statute has not stated a redressable claim where another statute would bar the relief being sought. 111 S.Ct. at 2337-2338. As to §10012, appellees concede that §10013.5 is such an "alternative" statute. 5/21/93 Letter, p.3. Appellees point out, however, that they *have* challenged §10013.5. *Ibid.* But appellees' challenge to §10013.5 is indisputably moot. *See* §C below. Hence, "there is reason to doubt that the injury alleged by these [candidates] can be redressed by a declaration of [§10012]'s invalidity. . . . " *Renne*, 111 S.Ct. at 2337.

As appellees concede, §10013.5 provides an independent basis for striking references to party affiliation in candidate's statements as "inconsistent" with the chapter of the Code in which §10013.5 appears. That chapter provides for the mailing of sample nonpartisan ballots. *See* §§10010 and 10007. In California's nonpartisan scheme, those ballots may not refer to a candidate's party affiliation. §10200.5. It would be completely inconsistent with this scheme to allow nonpartisan candidates to

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[5] The centrality of the forum determination distinguishes this case from third party or "listener" standing cases other than *Renne*. *See, e.g., Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617, 623 n.3 (1989); *Va. Pharmacy*, 425 U.S. 748; and *Kleindienst v. Mandel*, 408 U.S. 753 (1972)

advertise their party affiliation in candidate's statements, particularly since such statements are mailed to all voters in the same pamphlet that contains the sample ballot. *See Renne*, 111 S.Ct. at 2345 (White, J. diss.); Brief on *Clark v. Burleigh*, filed May 10, 1993, at 5-6.[6] Appellees' failure to bring a timely challenge to §10013.5 renders their challenge to §10012 nonredressable.

Moreover, appellees' challenge to §10013.5 itself is nonredressable. Section 10015, a wholly independent statute that appellees ignore, "might be construed to prevent candidates from mentioning [party affiliation] in voter pamphlets, even in the absence of [§§10012 *and* 10013.5]." *Renne*, 111 S.Ct. at 2338. Section 10015(a) provides that "[a]ny voter may seek a writ of mandate alleging that an error or omission has occurred . . . in the printing of, a . . . voter pamphlet," where "the error, omission, or neglect [of duty] is in violation of this code or the Constitution." §10015(a)(2). Permitting candidates to advertise party affiliation in the Voter's Pamphlet violates provisions of the California Elections Code and Constitution establishing this state's nonpartisan system of local and judicial elections. *See, e.g.*, Cal. Const., Art. II, §6; Cal. Elec. Code §§37, 6401.5 and 10020.5. Thus, "there is reason to doubt that the injury alleged can be redressed" by invalidating the provisions under attack. *Renne*, 111 S.Ct. at 2338.

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[6] In San Francisco, sample ballots are part of the Voter's Pamphlet. The City asks the Court to take judicial notice of this fact. *See* Exh. E and Rule 201, Fed. Rules of Evidence.

C. APPELLEES' CHALLENGE TO SECTION 10013.5 IS MOOT

Appellees' challenge to §10013.5 arises from the second claim for relief in *Mark v. Corwin*. *Mark* complaint, ER (cross-appeal) 18-22. In that claim, appellees allege that the City obtained a court order deleting portions of a single candidate's statement before the November *1986* general election. *Id.*, ¶ 20, ER (cross-appeal) 22.

Significantly, this dispute was not live when appellees filed suit two years later on August 30, *1988*. *Id.* at 18. As the Supreme Court ruled in *Renne*:

> "While the mootness exception for disputes capable of repetition yet evading review has been applied in the election context, *see Moore v. Ogilvie*, 394 U.S. 814, 816 (1969), *that doctrine will not revive a dispute which became moot before the action commenced*. 'Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.' *O'Shea v. Littleton*, 414 U.S. 488, 495-496 (1974); *see Los Angeles v. Lyons*, 461 U.S. 95 (1983)." *Renne*, 111 S.Ct. at 2338 (emphasis added.)

There were no "continuing, present adverse effects" in August *1988* from the deletions in a candidate's statement in *1986*. The dispute over §10013.5 is moot.

Respectfully submitted,

LOUISE H. RENNE
City Attorney

/s/ D. Aftergut
DENNIS AFTERGUT
Chief Assistant City Attorney

[Appendices Omitted In Printing]

APPENDIX G

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5/21/93

TO: Clerk, Ninth Circuit Court of Appeals

RE: Court's Request for Letter Briefs RE: Renne v. Geary (1991) 111 S.Ct. 2331

Geary v. Renne (and related consolidated cases)
N.D. Nos. 87-4724 AJZ and 88-3483-AJZ
Appeals Nos. 89-15601; 89-15603; 89-15719; 89-15720

Dear Honorable Judges:

The City's reference to the Supreme Court's *Renne* decision appears to be a tactic designed to divert attention from the issues central to this case. *Renne* addresses standing, redressability and ripeness problems that are not even remotely involved in the portions of these cases before the court in the present en banc proceeding.

SUMMARY OF RENNE v. GEARY

Renne v. Geary involved a portion of one of these consolidated cases in which plaintiffs (all suing as voters or members of county central committee) sought injunctive and declaratory relief in 1987 against enforcement of a *1986* amendment to California Constitution, Article II, Section 6, barring central committees of political parties from endorsing candidates for local, school or judicial office.

Said action was brought before Article II, Section 6 had ever been enforced once, on the theory that defendants would use said law to censor any candidate's statement that listed said endorsements. Defendants, in fact, had never actually done so!

The court found three problems with justiciability of the case:

(1) Standing – the court doubted standing of County Committee members, as opposed to the County Committees themselves to sue. With respect to voter standing, the court found that redressability problems raised by the fact that another California law (Election Code Section 10012) might still permit censorship of endorsements made voter standing insufficient. See 111 S.Ct. at pp. 2337-2338.

(2) Redressability – the court doubted that invalidation of Cal. Const. Article II, Section 6 would necessarily eliminate voter pamphlet censorship of county committee endorsements because of the existence of California Elections Code Section 10012. Ibid., see also conc. opn. of Stevens, J., at pp. 2341-2342.

(3) Ripeness – at the time suit was filed in 1987, Cal. Const. Article II, Section 6 had never been enforced. The court found lack of evidence of "credible threat" of enforcement of the law under said circumstances. Also, suit was not followed by enforcement efforts which appeared as of record. Also, in part because the county committees were not parties, it was unclear that endorsements actually would be made in the future in violation of the endorsement ban, therefore, raising doubts that a speaker existed whose speech was being censored by Cal.

Const. Article II, Section 6. Id., at pp. 2338-2339, and 2341 (conc. opn. of Stevens, J.)

APPLICATION OF RENNE V. GEARY TO THIS CASE

Here, none of the problems referenced in *Renne, supra,* exist:

(1) Standing: None of the challenged statutes herein apply solely to county committees, as did Cal. Const. Art. II, Sec. 6(b). Rather, on their face, Elections Code Sections 3795 and 5025 apply to all submitters of ballot arguments; and Elec. Code Secs. 10012 and 10013.5 to all submitters of candidate's statements. Thus, no issue exists as to the standing of individual county committee-members to assert the free speech rights of county committees.

Plaintiffs Bob Geary, Robert Silvestri, Dennis Mark, Max woods, Terence Faulkner, Sudi Trippet, and Election Action all clearly have standing to challenge Elections Code Sections 3795 and 5025 as ballot argument submitters who have faced censorship and censorship proceedings under Elections Code Sections 3795 and 5025.

Plaintiffs Dennis Mark, Bob Geary, Robert Silvestri and Max Woods all have standing to challenge Elections Code Sections 10012 and 10013.5 as candidates who have faced censorship problems with their candidate's statements.

In addition, all plaintiffs have standing to sue as voters (or organizations of voters) whose right to read and hear ballot arguments and candidate's statements in uncensored form has been abridged by application of the

four statutes in question. See *Virginia Pharmacy Board v. Virginia Citizens Consumers Council* (1976) 425 U.S. 748, 756-757 (recognizing "listner" standing to challenge restrictions on pharmacy advertising of prices in case where no pharmacist was party); see also *Kleindist v. Mandel* (1972) 408 U.S. 753, 752.* Here, as will be shown, *post*, no redressability or ripeness questions exist.

(2) Redressability – as to Elections Code Sections 3795 and 5025, plaintiffs can conceive of no "redressability" problem: invalidation of these statutes would eliminate censorship of ballot arguments. Plaintiffs know of no alternative provision on which defendants could base censorship.

Similarly, invalidation of Elections Code Section 10013.5 would eliminate censorship of candidate's statements based on said statements being "false, misleading, or inconsistent." No other statute exists that would support censorship on such grounds.

With respect to Elections Code Section 10012's provision that candidate's statements "shall not include the party affiliation of the candidate, nor membership or activity in partisan political organizations," the only "alternative" statute under which defendants could obtain censorship of offending materials would appear to be Elections Code Section 10013.5, which is also challenged in this litigation.

Any possible argument that the censorship authorized by Elections Code Section 10012 is also authorized by Cal. Const. Article II, Sec. 6 is belied by the language

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* [Typographical errrors in the original document have not been corrected in this Appendix.]

of said provision, which *only* bars endorsements by political parties and their central committees in local, school and judicial races. Such provision does not, in its own right, authorize censorship of party affiliations, or membership and activity in partisan organizations from the voter's pamphlet, though the converse argument that Elections Code Section 10012 may authorize censorship of endorsements by county committees on the basis that publication of such endorsements would tend to publicize candidate party affiliations might be viable. See *Renne, supra*. In any event, defendants – who have resisted the contention that Cal. Const. Article II, Sec. 6 *itself* authorizes censorship of references to party affiliation or partisan activities and memberships of candidates where unaccompanied by a party endorsement of the candidate, cannot now be held to argue otherwise. In fact, all four or five examples of censorship under Elections Code Section 10012 that appear in the record were examples of speech that *in no case included an endorsement of a candidate by a county committee.* See ER of Appellees', pp. 126-___. Since it does not appear that Cal. Const. Article II, Sec. 6 could have supported censorship in these specific instances, no redressability problem could possibly exist.

(3) Ripeness – Unlike California Constitution, Article II, Section 6, the statutes at issue herein have repeatedly been enforced. Therefore, no issue can exist as to whether any would-be speaker is likely to violate same, or that defendants are likely to enforce said provisions, in the future. Nor can doubts of ripeness exist based on notions that state courts might narrow the statutes if actually enforced, making litigation before any enforcement premature.

The record indicates that defendants and others have repeatedly utilized the challenged statutes to censor candidate's statements and ballot arguments. See Appellee's ER 126-142; ER on Cross-Appeal, 162-165. Said use of the challenged statutes to effectuate censorship continued after the instant lawsuits were filed and occurred in connection with elections in November, 1987, June 1988, and November, 1988.

Even the majority in *Renne, supra,* at pp. 2338-2339 acknowledged that there would have been no problem of ripeness *if* a county committee had endorsed candidates for non-partisan office *after* the lawsuit was filed and defendants had attempted to enforce the state constitutional provisions following such endorsements. Indeed, the majority noted that "the mootness exception for disputes capable of repetition yet evading review," would have applied in such case. Id., at p. 1338. It was non-applicable in *Renne* only because "that doctrine will not revive a dispute which became moot before the action commenced." *Ibid.* Under the reasoning of *Moore v. Ogilvie* (1969) 394 U.S. 814, 816; *Anderson v. Celebrezze* (1983) 460 U.S. 780, 784, fn. 3; *First National Bank v. Bellotti* (1978) 435 U.S. 765, 774-775; and *Storer v. Brown* (1974) 415 U.S. 724, 737, fn. 8, the existence of post-litigation enforcement of the challenged statutes would make this case ripe under the "capable-of-repetition-yet-evading-review" doctrine even if no other basis for finding ripeness existed.

In fact, the large number of instances in which the statutes have been enforced and resulted in censorship of election-related speech makes this case remarkably similar to *Wooley v. Maynard* (1977) 430 U.S. 705, wherein

repeated past enforcement of a statute requiring display of an ideological message was held was held to support ripeness based on the high likelihood of future enforcement.

Certainly, the presence of past enforcement makes this case far more ripe for review than the elections statutes successfully challenged in *Buckley v. Valeo* (1976) 424 U.S. 1 and *Eu v. Democratic Committee* (1989) 489 U.S. 214 – statutes which had never been violated or enforced. The high court's failure to expressly overrule *Buckley* or *Eu* in Renne leads to the inescapable conclusion that it was not lack of violation or past enforcement that lead to a finding of lack of ripeness in Renne, but the unique "redressaibility" problem caused by the possibility that invalidation of Article II, Sec. 6 might not eliminate the possibility candidate endorsements by county committees would still be censored under Elections Code Section 10012. Any other reading of *Renne* would imply that, without so stating, the high court disapproved numerous earlier cases such as *Buckley* and *Eu*. A far more reasonable reading of *Renne* can and must, ultimately, focus on the redressability problem. Here, there is no redressability problem, hence the case is ripe under *Buckley* and *Eu*.

As a concluding remark, plaintiffs would add that the California appellate courts have had repeated chances to review and narrow at least three of the four statutes (Elec. Code Secs. 3795, 5025, and 10013.5). They have not only failed to do so, but have, in fact, given said statutes such as sweeping interpretation in terms of authorizing censorship that even the panel decision in this case had doubts about the constitutionality of the statutes as so

construed. See *Patterson v. Board of Supervisors* (1988) 202 Cal.App.3d 22, 29 (holding statutes may be used to censor any material in ballot argument "not clearly germane to /a/ ballot proposition."). The California Supreme Court has not only failed to narrow said statutes, but has twice granted review of cases involving Elections Code Section 10013.5, then dismissed same. See *Callignan v. Superior Court* and *Drexel v. Mann*.

A more "ripe" dispute than the instant one would be difficult to find.

For all of the foregoing reasons, it is respectfully submitted that *Renne, supra,* has no bearing on this case. At most, the subject of these five-page letter briefs deserves maybe a short footnote in the court's final opinion en banc.

Sincerely,

Arlo Hale Smith
Attorney for Plaintiffs

APPENDIX H

[Filed NOV 16 1989]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOUISE RENNE, San Francisco City Attorney, *et al.*, Defendants and Appellees, vs. BOB GEARY, *et al.*, Plaintiffs and Appellants,	NO. 89-15601 (N.D.Cal. No. C87 4724 AJZ) (Cross-Appeal No. 89-15720)
MICHELLE CORWIN, Acting Registrar of Voters, *et al.*, Defendants and Appellees, DENNIS MARK, *et al.*, Plaintiffs and Appellants.	NO. 89-15603 (N.D.Cal. No. C88 3483 AJZ) (Cross-Appeal No. 89-15719)

Appeal from the Judgment of the United States District Court for the Northern District of California
The Honorable Alfonso J. Zirpoli, Judge

OPENING BRIEF OF DEFENDANTS-APPELLEES

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* * *

[p. 31] final judicial decision' [citation] is made . . . by the guaranty of a speedy determination in the trial court." *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 690 fn. 15, 20 L.Ed.2d 225, 88 S.Ct. 1298 (1968); *Ellwest Stereo Theatres, Inc. v. Nichols*, 403 F.Supp. 857, 862 (M.D.Fla. 1975). Sections 3795, 5025 and 10013.5 are valid under *Freedman*.

II. THE TRIAL COURT ERRED IN HOLDING THAT SECTION 10012 AUTHORIZES AN INVALID PRIOR RESTRAINT OF SPEECH

The District Court also invalidated Section 10012. Section 10012 prohibits a candidate for nonpartisan office from including in his or her candidate's statement a reference to the candidate's party affiliation or "membership or activity in partisan political organizations." In San Francisco, these statements are submitted as part of the nomination process for the City elective office and are included in the Voter Information Pamphlet. Charter Sections 9.104 and 9.105 are attached as Exhibits E and F, respectively.

Section 10012 is one of the measures adopted by California to implement Article II, Section 6, subsection (a) of the California Constitution, which mandates that all judicial, school, city and county offices be nonpartisan. This Court has recognized that preserving the nonpartisanship of judicial and local offices is a compelling state interest. *Geary*, 880 F.2d at 1072. The evidence in this case supports that conclusion. See *Mark* CR's 24, 28, SER at pp. 17 - 23.

[p. 32] Section 10012 also is narrowly drawn to further this compelling interest. Section 10012 does not regulate the speech of third parties or the private speech of candidates. Rather, its focus is narrow: references in the publicly-subsidized Voter Pamphlet to the candidate's party affiliation or party activities. Without Section 10012's prohibition against referring to political parties in candidates' statements, candidates for nonpartisan local and judicial office could use the publicly subsidized Voter Information Pamphlet to tout their partisan affiliations, activities and endorsements. Instead of serving as a forum to discuss candidates' qualifications, the Voter Pamphlet would be used to debate who is the better Democrat or the more loyal Republican.

The District Court did not question the importance of Section 10012 in preserving the nonpartisan nature of local and judicial offices. Rather, the Court held that Section 10012 constituted an invalid prior restraint because, according to the Court, it authorizes the Registrar of Voters to remove references to party affiliation or partisan activities without the procedural safeguards required by *Freedman*. For two reasons, the District Court erred.

Although Section 10012 is silent as to who enforces its prohibition against including references to partisan activities or affiliation, the District Court interpreted Section 10012 as authorizing the Registrar of Voters to

remove partisan references [p. 33] from the Pamphlet.[8] The Court held that this type of administrative discretion would be valid only if exercised consistent with the *Freedman* requirements. Such a conclusion, however, did not require the Court to invalidate Section 10012. Rather, the District Court could have issued its ruling and assumed that state courts would have applied Section 10012 consistent with this "constitutional command." *Time, Inc. v. Hill*, 385 U.S. 374, 397, 17 L.Ed.2d 456, 87 S.Ct. 534 (1967).

In *Hill*, the Supreme Court held that a judgment imposing a civil penalty on a publisher under a state right to privacy law was invalid under *New York Times*. The Court, however, declined to invalidate the state law as a whole, based on its expectation that "the New York courts will apply the statute consistently with the constitutional command" provided by the Court. 385 U.S. at 397; see also, *Alexander v. Thornburgh*, 713 F.Supp. 1278, 1292-93 (D.Minn. 1989) (declining to invalidate RICO provision as authorizing prior restraint on assumption that "courts will apply statutes in a manner consistent with standards required by the Constitution as interpreted by Supreme Court.")

Hill has particular force here. First, as noted, Section 10012 does not specify who is to enforce the prohibition against partisan candidates' statements; accordingly, the court would not [p. 34] have been required to write anything out of the statute. Also, as discussed above,

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[8] Presumably, the Court's conclusion was based on the fact that at least one former Registrar of Voters did remove partisan references from a candidates' statements. ER at p. 20.

Section 10013.5 sets forth a procedural vehicle that satisfies *Freedman*. Section 10013.5 authorizes a court, after finding on clear and convincing evidence that material in a candidate's statement is "inconsistent with the requirements of this chapter," to order such material removed. Clearly, a reference to a candidate's party affiliation or activities is inconsistent with the requirements of Section 10012, found in the same chapter of the Elections Code as Section 10013.5. Since, by its terms, Section 10013.5's judicial procedure applies to Section 10012, the court was not required to engage in construction of a state statute. Rather, the court should have presumed that, given its constitutional mandate, California Courts would have construed Section 10013.5 as applying to Section 10012. The District Court erred by invalidating Section 10012.

More fundamentally, by holding that *Freedman* applies to Section 10012, the trial court failed to recognize that each medium of communication must have its own rules which reflect the " 'differing natures, values, abuses and dangers' " of the medium. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 500-01, 69 L.Ed.2d 800, 101 S.Ct. 2882 (1981); *see Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-58, 43 L.Ed.2d 448, 95 S.Ct. 1239 (1975). The principles governing the prior restraint of private publications have no application to regulations regarding access to a limited public forum dedicated to a particular

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UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

LOUISE RENNE, San Francisco City Attorney, *et al.*, Defendants and Appellees, vs. BOB GEARY, *et al.*, Plaintiffs and Appellants,	NO. 89-15601 (N.D.Cal. No. C87 4724 AJZ) (Cross-Appeal No. 89-15720)
MICHELLE CORWIN, Acting Registrar of Voters. *et al.*, Defendants and Appellees, DENNIS MARK, *et al.*, Plaintiffs and Appellants	NO. 89-15603 (N.D.Cal. No. C88 3483 AJZ) (Cross-Appeal No. 89-15719)

Appeal from the Judgment of the United States District Court for the Northern District of California
The Honorable Alfonso J. Zirpoli, Judge

DEFENDANTS-APPELLEES' ANSWER TO PETITION FOR REHEARING

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[p. 13] utterance. Accordingly, "[a]n author risks nothing except possible deletions." Slip Op. at 11339.

For the same reason, *Brown v. Hartlage*, 456 U.S. 45 (1982) and *Vanasco v. Schwartz*, 401 F.Supp. 87 (E.D.N.Y. 1975), *aff'd* 423 U.S. 1041 (1976), upon which Plaintiffs rely, are inapposite. Both involved statutes that imposed post-utterance sanctions for private political speech.

The court correctly concluded that the challenged statutes are neither unconstitutionally vague nor overbroad. A rehearing is unwarranted.

IV. The Court Correctly Concluded That Section 10012 Is Valid

Plaintiffs next challenge the Court's holding with respect to Section 10012, which prohibits candidates for nonpartisan office from including in their statements of qualifications a reference to their party affiliation or "membership or activity in partisan political organizations." Plaintiffs first contend that Section 10012 is invalid because it authorizes "administrative censorship." Petition at pp. 12-13. Plaintiffs also claim that Section 10012 unconstitutionally restrains protected speech. Petition at pp. 13-15. The Court properly rejected both arguments.

A. Section 10012 Does Not Authorize Administrative Censorship

Plaintiffs claim rehearing is appropriate because "the panel decision does not even address the lack of

procedural safeguards in Election 10012." Plaintiffs' argument ignores the Court's analysis of this question.

The Court did not discuss Section 10012's "lack of procedural safeguards" because the Court concluded that the prohibition set out in Section 10012 is enforced through the judicial procedure set out in Section 10013.5. The Court's conclusion is supported by the explicit language of Section 10013.5, which (1) refers specifically to candidates' statements [p. 14] submitted pursuant to Section 10012, and (2) establishes the procedure for removing materials "inconsistent" with the Elections Code chapter Code that includes Section 10012. As discussed in Section II of this Answer, under Section 10013.5, only a court may remove such material, and then only if the party challenging the material demonstrates by clear and convincing evidence that it violates Section 10012. This procedure satisfies *Freedman*.

B. Section 10012 Does Not Unconstitutionally Restrain Speech

The Court correctly concluded that Section 10012 does not unconstitutionally restrict speech. In San Francisco, candidates' statements are submitted as part of the nomination process for nonpartisan office and are included in the Pamphlet, a publication bearing the City's imprimatur.

As the Court observed, Section 10012 is one of the laws adopted by California to advance its interest in preserving nonpartisan local and judicial elections. See

CAL. CONST., Art. II, Sec. 6(a).[4] The Court also correctly held that Section 10012 is narrowly tailored to further this interest. Contrary to Plaintiffs' suggestion, Section 10012 is not a sweeping prohibition on political speech. Rather, it focuses narrowly on *candidate* speech appearing in the *official nomination papers* for nonpartisan City offices.[5] Indeed, as the Court correctly observed, an en banc panel

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[4] Article II. section 6(a) provides, "All judicial, school, county and city offices sha11 be nonpartisan."

[5] Curiously, Plaintiffs also attack Section 10012 because it does not restrict candidates' speech *outside* of the Pamphlet. Petition at 14-15. In doing so, Plaintiffs ignore the substantial difference between the City's compelling interest in preserving the integrity of the City's nonpartisan nomination process and official election materia\s, and the lack of interest the City has in regulating privately-published speech.

[Filed MAY 12 1993]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BOB GEARY, et al., Plaintiffs-Appellees, v. LOUISE RENNE, et al., Defendants-Appellants.	)	No. 89-15601 D.C. No. CV-87-4724-AJZ (Cross-Appeal No. 89-15720)
DENNIS MARK, et al., Plaintiffs-Appellees, v. MICHELLE CORWIN, et al., Defendants-Appellants.	)	No. 89-15603 D.C. No. CV-88-3483-AJZ (Cross-Appeal No. 89-15719)

Appeal from the United States District Court
for the Northern District of California

APPELLANTS' BRIEF ON *CLARK V. BURLEIGH*

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[p. 6] their party on the ballot, *see* §10200.5, but allow them to advertise their affiliation in the pamphlet that voters use to make their selections. To borrow from Justice White's dissent in *Renne v. Geary*, 111 S.Ct. 2331, 2345 (1991):

> If the State may exclude party designations from the ballot, it surely may exclude party [affiliation] from candidate statements contained in the official voter pamphlet prepared by the government and distributed to prospective voters.
>
> The voter information pamphlet obviously is not a traditional public forum, and its use may be limited to its intended purpose, which is to inform voters about *nonpartisan* elections. *See Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, n.7 (1983). Refusing to permit references in candidate statements to party [affiliation] is therefore plainly constitutional. (Emphasis original.)

Mark has never challenged section 10200.5 or Article II, §6(a) of the California Constitution, which establishes California's nonpartisan system of local government. Nor has he challenged other statutory provisions making nominations for local and judicial offices nonpartisan. *See* §§37 [parties may not nominate in nonpartisan elections] and 6041.5 [nomination papers in municipal elections may not refer to party affiliation]. Given this acceptance of California's nonpartisan system, the exclusion of partisan reference in the statements of candidates for local and judicial office clearly has a rational basis.

4. Sections 10012 and 10013.5 Do Not Authorize Unconstitutional Prior Restraints.

Mark contends that §§10012 is unconstitutional because it authorizes administrative censorship without judicial review. The panel in this case disagreed, holding that "[e]nforcement is through §10013.5, which authorizes the state to seek a judicial order amending or deleting portions of a ballot argument." *See Geary v. Renne*, 914 F.2d at 1255.

Burleigh supports this result. There, the court upheld §10012.1, which [p. 7] *mandates* that the county clerk "shall not cause to be printed or circulated any statement which the clerk determines" to violate the statute's terms. Section 10012 includes no such mandate. If §10012.1 is not facially invalid for authorizing administrative censorship, neither is §10012.[6]

Mark also claims that §10013.5 authorizes invalid prior restraints, even though judicially imposed. In *Burleigh*, §§10012 and 10012.1 were judicially enforced through an action for declaratory relief. 4 Ca1.4th at 480. The California Supreme Court declined to find any unconstitutional prior restraint in the superior court's order amending the candidate's statement before publication.

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[6] Mark may seek to distinguish *Burleigh* on the ground that the registrar there actually obtained a judicial order deleting the offending material, while the registrar here did not. Such a claim, however, goes to the application of §10012 and not to its facial validity. The City accepts that §10012 is properly enforced only through judicial proceedings.

While as originally published, *Drexel v. Mann*, 13 Cal.App.4th 170, 185-187 (1991), squarely rejected a challenge to §10013.5 identical to Mark's challenge here, that decision was superseded by the California Supreme Court's grant of review. *See* Cal. Rules of Court, Rule 976(d).[7] Accordingly, *Drexel* is no longer citable authority. *Id.*, Rule 977. Nonetheless, *Patterson v. Board of Supervisors*, 202 Cal.App.3d at 31, upon which *Drexel* relied, remains citable. *Patterson's* rationale on the issue of prior restraint is identical to that of the panel here; namely, that §10013.5 (like §§3975 and 5025) satisfies the procedural safeguards of *Freedman v. Maryland*, 380 U.S. 51 (1965). 914 F.2d at 1254-1255. The panel also held that the

* * *

[7] Rule 976(b) permits the Supreme Court to order published a decision when the grant of review is later dismissed. The court did not do so here, which may be understandable in light of the fact that *Drexel* employed the forum analysis rejected in *Burleigh*.

APPENDIX I

APPENDIX I

GEARY v. RENNE
[CITY'S OPENING ARGUMENT]

CHIEF JUDGE WALLACE: Good morning, ladies and gentlemen. This is the time assigned for the hearing *en banc* of the case of *Geary v. Renne.* There's 30 minutes per side total. You keep track of your own time that's in front of you, and we'll hear from the appellant first.

AFTERGUT: Chief Judge Wallace and may it please the Court. My name is Dennis Aftergut. I am the Chief Assistant City Attorney for the City and County of San Francisco. I represent appellants and cross-appellees Louise Renne in *Geary v. Renne* and appellants and cross-appellee Michelle Corwin, formerly the registrar of the City and County of San Francisco, in the second case, *Mark v. Corwin.*

This case involves challenges to two sets of statutory provisions in the California Elections Code that govern access to the Voter's Information Pamphlet.

In *Geary v. Renne,* the two statutes of the California Elections Code are §§3795 and 5025. Those statutes provide that any voter or the registrar of voters of a county may go to court to seek an order amending ballot arguments to the extent that those arguments contain statements

which are false, misleading or inconsistent with the requirements of the Elections Code. The registrar or the voter who goes to court bears the burden by clear and convincing evidence of convincing the court.

The second case, *Mark v. Corwin*, involves two statutory provisions, California Elections Code §§10012 and 10013.5, regulating access to candidate's statements in the voter pamphlet. Section 10012 relates to, provides that candidates may set forth their education, qualifications and may not set forth their party affiliation. Section 10013.5 provides that any voter or the registrar of voters may go to court to get an order striking from a candidate's statement in the voter pamphlet statements which are false, misleading or inconsistent with the requirements of the voter's pamphlet [sic].

In the first part of the case, *Geary v. Renne*, very briefly, what the trial court did, what District Court Judge Zirpoli did, was he held that §§3795 and 5025 do not impose invalid prior restraints, but he held that to the extent that they allow for the deletion of false and misleading statements in ballot arguments, they are unconstitutional because they do not require "actual malice" under *New York Times v. Sullivan*. Judge Zirpoli also held, he upheld the sections insofar as the requirement that statements that are inconsistent with the Elections Code

may be stricken to the extent of those statements are not germane to the measure as to which they've been submitted.

In the *Mark v. Corwin* side of the case, Judge Zirpoli invalidated §10012 because it imposes an invalid prior restraint which allows for administrative censorship in his view, and he invalidated §10013.5 on the same basis that he invalidated §§3795 and 5025; that is, there's no "actual malice" requirement.

What I'd like to do in this argument is bring to the court's attention several arguments in addition to those that we have made in our briefs. And for better or for worse, those arguments all relate to the *Mark v. Corwin* side of the case; that is, the challenges to the statutes regulating access to candidate's statements.

By my focusing on that side of the case, I don't want the court to infer by any means that I agree with what the district court did in striking down, or in requiring "actual malice" with respect to the ballot pamphlet statutes. And I don't want the court to think by any means that I think that those statutes, the ballot pamphlet statutes, are unimportant. There is really no way that I could overstate their importance in preserving the voter information pamphlet as a valuable tool for educating voters in elections, local elections in California.

But for better or worse, as I say, the *new* points that I want to bring to the court's attention all relate to §§10012 and 10013.5.

There are basically three areas that I want to cover. The first relates to the issues of justiciability. The second, if you get beyond justiciability, I want to explain why the district court exceeded what it could properly do under settled principles of federal jurisprudence. And thirdly, I want to answer arguments that were made in appellees' May 10 brief on *Clark v. Burleigh.* I want to explain to you why their argument that *Clark v. Burleigh* was wrongly decided, why that argument itself is wrong.

The first point I want to make, goes to justiciability. And this is in addition to the points that we made in our May 24, 1993 letter to the Court on these issues.

In *Renne v. Geary,* the Supreme Court case that was decided in 1991, that's related to the first part of this case, the Supreme Court made clear that a case is not justiciable if *there is reason to doubt* that the injury alleged may be redressed by the relief that's been sought. In preparing for this argument, I looked closely at the complaint in this case with that test in mind; as closely as I probably should have looked before this argument.

But if you look at the complaint, the first claim for relief in *Mark v. Corwin*, which challenges the validity of §10012, what's the *injury* that's alleged? The injury that's alleged is the injury to the desire of voters to read *unedited* ballot arguments. That's the injury.

What's the *relief* that's been sought? If you look at the prayer for relief in this case, in *Mark v. Corwin*, with respect to §10012, the relief that's sought is a declaration of invalidity, and an injunction against enforcing 10012, and here are the critical words – *"insofar as that section authorizes administrative censorship."* That's the relief that's been sought: "Insofar as the statute authorizes administrative censorship." What that means is if there are other statutes which in conjunction with §10012, which authorize *non*administrative censorship, that is, *judicial* editing of candidate's statements, there is "reason to doubt" that the injury that's alleged – the desire of voters to read *unedited* candidate's statements – there is "reason to doubt" that that injury will be redressed.

And, there *are* other statutes that authorize *judicial* editing of candidate's statements. There is, of course, §10013.5, which allows a registrar to go to court to get stricken materials from candidate's statements which are inconsistent with a, with the requirements of the Elections Code.

The appellees have *challenged* that section here, but as we have pointed out in our brief, that challenge, that dispute was not *live* at the time that they brought the action. We made that argument in our letter of May 24. I don't need to elaborate on it. We, basically, the, the action that was alleged was an action in 1986. That action was not alive in 1988 when they brought this action.

But in addition to §10013.5, there are other California statutes which authorize a court to admin-, I'm sorry, to judicially enforce §10012. In fact, if you look at *Clark v. Burleigh*, that's exactly what happened in *Clark v. Burleigh*. The voter in that case who brought that action under the companion statute to 10012, the statute at issue there was 10012.1, didn't use 10013.5 to enforce the terms of the Elections Code. The voter in that case, a private party, used California Civil Procedure Code §1060, a code for, a provision for declaratory relief, and got an order from a California superior court judge which said that the statement there was inconsistent with the requirement of the Code, and got *editing* of the candidate's statement. And the *point* is, that because that statute exists even in addition to §10013.5, that the relief that's been sought here, the invalidation of §10012 "insofar as it permits *administrative* censorship," is not likely to be redressed by, is not likely to redress the injury here, which is, voters

who want to read *unedited* candidate's statements.

And, from our point of view, that makes the challenge to §10012 nonjusticiable. There is no redressability and frankly, from our point of view, that ends the challenge to §10012.

But in the event the court disagrees with me on that point, and I don't believe the court should if one reads *Renne v. Geary*, in the event the court disagrees, I move to my second point, which is why the district court in this case erred by striking 10012 in its entirety.

JUDGE WALLACE: Before you go on, I need some help on a point. I understand, I track your argument. Does it apply to the prohibition against party identification in a candidate's statement?

AFTERGUT: Yes. It applies, it applies to that because that is a substantive term of §10012. And in this complaint, the, what the relief that is sought is not the invalidation, if you look at the complaint, it's not the *substantive* invalidation of §10012, it's the *procedural* invalidation of §10012.

JUDGE WALLACE: So you're not saying that the argument applies but it applies to this case because in the complaint they're not challenging that provision.

AFTERGUT: That's right.

JUDGE WALLACE: But the relief they seek . . .

AFTERGUT: The relief they seek . . .

JUDGE WALLACE: It doesn't provide for any kind of discretion.

AFTERGUT: Yes. In another case, if someone, in another case if someone challenges the substantive validity, the court might have that issue before the court, but it's not before the court because of the nature of the complaint.

JUDGE FLETCHER: Counsel, do we look only at the complaint or were there other pleadings or issues somehow tendered to the district court to cause it to rule on a broader basis than you're suggesting here?

AFTERGUT: Under *Renne v. Geary,* I believe the court looks at the complaint, the, and, and under the cases that are cited there. The question is, is the, is the injury going to be redressed or, is it, is there reason to doubt the injury will be redressed by the relief that's been sought? And I think that if you look . . .

JUDGE FLETCHER: Well, what I'm asking you is, was broader relief eventually sought in this case? I don't know; because I have not in a detailed fashion read the whole district court record.

AFTERGUT: I'm not sure what one would look to beyond the complaint, and the prayer of the complaint for the relief. That is to say, I don't believe that one would look to evidence that was submitted. I don't believe one would look to the, that one would even look to memoranda of points and authorities. I think it's the relief praying the, sorry, the complaint and the prayer for any relief that's sought. And if you look at *Renne v. Geary*, what the Court is saying in that case is that, these complaints, because federal-courts are courts of limited jurisdiction, are to be strictly construed. The burden, as *Renne v. Geary* said, is on the complaining party who comes to court seeking relief to show that he has a justiciable claim. And, if you look at that case and the *language* of that case, you see how heavy that burden is, and how all doubts are resolved against the complaining party with respect to issues of justiciability.

JUDGE BRUNETTI(?): Counsel, didn't this come up on summary judgment?

AFTERGUT: It did.

JUDGE BRUNETTI(?): And wasn't there any, was, are you saying there's nothing that was submitted in summary judgment that would change the relief requested in the prayer?

AFTERGUT: I, what I'm saying is, that I think that the, that the prayer in the complaint is what determines what, is what determines the relief that's requested, and if, for example, the issue of the substantive validity of §10012 was briefed, which it probably was, I haven't reviewed the pleadings below, but it probably was, I think that's immaterial because the complaint itself did not request that. In other words, if the parties in their, in their memoranda went beyond the, the pleadings, I don't think that matters. If you read *Renne v. Geary* carefully, the Court is strictly construing the complaint itself, and I think that's what determines the issue here.

JUDGE RYMER: What did you say, what is the statute that authorizes judicial editing of these statements?

AFTERGUT: There are, these are, actually there are three statutes. The first is 10013.5, which is challenged in the second claim for relief in this case. But there are two other statutes, I only mentioned one. The one statute that was used in *Clark v. Burleigh* was California Code of Civil Procedure §1060, the declaratory relief statute. The party went to court, got a, got a declaration that the candidate's statement in *Clark v. Burleigh* was inconsistent with the requirements of §10012.1 and got a declaration from the California court that, that §10012.1 was

constitutional. So that was the statute, not 10013.5.

There's one other statute that could be used and that is, California Code of Civil Procedure §1085. That's a writ of mandate statute, an injunctive statute, which would, which would allow for the same kind of relief. Neither of those two statutes have been challenged in this case.

My, my second point is that the district court in this case, even if you get beyond the justiciability issue, exceeded its proper federal authority in invalidating §10012 as a whole, and this is very closely related to the argument that I just made. It is a settled principle of federal jurisprudence and comity that a federal court, even in a first amendment case, should not extend its invalidation of a statute beyond what is necessary to dispose of the case. I am almost quoting verbatim from *Brockett v. Spokane Arcade*, a case we cited in our letter of June 17, 1993 to the court. The court should, a federal court should not go beyond, should not extend its invalidation of a statute beyond what is necessary to dispose of the case.

In this case, the relief that was sought was invalidating §10012 "insofar as it authorized administrative censorship." If you get past the justiciability question, the limitation on the district court,

what it *should* have done was to say, "This statute, I can resolve this case by simply invalidating it procedurally, but leaving 10012 available substantively, leaving it on the books," and that's particularly so because the challenge to §10013.5, as we have argued, is moot.

Again, we think that ends the case, but I would like to move to my third point, in case the court disagrees and talk . . .

JUDGE WALLACE: Counselor, do you have a suggestion as to how we could parse this statute, so we could strike down only a part of it to deal directly with the administrative censorship?

AFTERGUT: Well, what the panel in this case said, on this particular point, was that §10012 is enforced through §10013.5 and, and that point, by the way, was also made in Judge Hug's decision in *Kaplan* in the second paragraph. He says exactly the same thing. Section 10013.5 is the means of enforcing §10012 and §10012.1. So that basically what the court would say would be: "10012, it must be enforced judicially."

JUDGE WALLACE: That, that wouldn't be a striking of the statute, that would be a form of declaratory relief.

AFTERGUT: I, I suppose that's correct.

JUDGE WALLACE: And I, and I don't suppose anyone disagrees with the analysis that, I don't suppose, that 10012 merely sets up what can be done and its enforceability is in 10013.5, and what the plaintiffs are asking is that you do it that way, and the City not administratively use censoring but go to the court. Your view is, as I understand it, that that's what, if you grant the, the, the case, that's what the district court should have done, have said that, "You may not administratively enforce that section, you can enforce it only through 10013.5," is that correct?

AFTERGUT: That's correct. Our view is that the district court . . .

JUDGE WALLACE: And the City would be happy with that.

AFTERGUT: That's correct, your Honor. The district court should not have gone beyond that, should not have gone beyond that point and . . .

JUDGE WALLACE: And that's all, and that's all the plaintiff asked for, was that.

AFTERGUT: That's correct your honor. Absolutely correct.

My last point, in the event this court were to disagree with us on justiciability and on the point that we've just made, I want to very briefly, because I'd like to

reserve five minutes of my time for rebuttal, I want to very briefly respond to substantive points, points on the merit, on the, on the substantive validity of §10012, points that were made in appellees' brief of May 10.

In that brief appellees say that *Clark v. Burleigh* was wrongly decided. And the heart of their argument really is that, if you look at a few Supreme Court cases, I should back up for a moment. In *Clark v. Burleigh*, the court said that the relevant forum in a candidate's statement case is the candidate's statement, and a candidate's statement is a non-public forum.

But appellees say, "That decision is wrong. A candidate's statement is not a nonpublic forum, it's a *public* forum." And what the appellees say is that if you look at Supreme Court cases, what you find is that, what characterizes a *nonpublic* forum is that the principal purpose of the forum is not expressive, and expression in the forum is really incidental to the purposes of the forum.

And they cite the *Kokinda* case, where the sidewalk, the purpose of the sidewalk was not for expression, it was for access to the post office. They cite *International Society of Krishna Consciousness v. Lee*: The principal purpose of an airport is not expression, and expression in the airport is incidental.

The problem with that analysis is that it is incomplete, and it doesn't take account of many other Supreme Court cases. For example, if you look at *Cornelius,* what was the *forum* in the *Cornelius* case? It was the federal fundraising drive. It was the fundraising drive in a federal workplace. That was the *forum.* The central *purpose* of that forum is solicitation, that is, protected expression. That was not *incidental* to the forum.

If you look at *Lehman v. Shaker Heights,* which is the bus placard case, the advertising placard for the bus, the *forum* that the Court identified, specifically, was, were the placards themselves. And the *purpose* of those placards is *expression.* Expression is not incidental, it's the central *purpose* of that forum.

What the appellees miss in their attack on *Clark v. Burleigh* is the central basis on which the Supreme Court determines that a forum is a nonpublic forum. And the central test is whether, whether, the, whether the government has intentionally *opened* the forum to *indiscriminate* use for expressive purposes. In those cases, in *Lehman,* in *Cornelius,* the Court decided the forum had not intentionally been opened for *indiscriminate* use by the public. And the same thing is true in this case with respect to candidate's statements.

JUDGE NORRIS: Is it opened for expressive, for an expressive purpose for some members of the public?

AFTERGUT: It is, it can be for some members of the public in some cases; in other cases, it's for all members of the public. But the, the, the cri- . . .

JUDGE NORRIS: I mean the candidate's forum.

AFTERGUT: I'm sorry.

JUDGE NORRIS: I'm talking about the candidate's forum.

AFTERGUT: I'm sorry, I didn't understand your question.

JUDGE NORRIS: Was it open for expressive purposes?

AFTERGUT: To all members of the public?

JUDGE NORRIS: No, to *some* members of the public.

AFTERGUT: It was . . .

JUDGE NORRIS: To those members of the public that it was opened to?

AFTERGUT: It was not opened for indiscriminate use by those members of the public.

JUDGE NORRIS: That's not my question. My question is whether it was opened to *some* members of the public for expressive purposes.

AFTERGUT: It, it was opened to candidates, yes, it was opened to candidates to explain their qualifications. But, respectfully, our view of the test is it must be for indiscriminate use, and the use here was quite limited by the terms of §10012.

Clark v. Burleigh was correctly decided. Candidate's statements are nonpublic forums, and because the classifications in §10012 are viewpoint-neutral and reasonable under the deferential standard in nonpublic forums, we believe that those statutes survive scrutiny.

JUDGE WALLACE: Even false and misleading?

AFTERGUT: Well, §10012 actually doesn't include the terms false and misleading. . . .

JUDGE WALLACE: Yes, but 10013.5 does.

AFTERGUT: Yes.

JUDGE WALLACE: And you think that would withstand scrutiny?

AFTERGUT: Yes.

JUDGE WALLACE: Even in a lower standard?

AFTERGUT: Yes, your Honor, because, because it is certainly reasonable to limit in candidate's statement that is going out in a, in a publication that is produced by the government, sent out at government expense to all voters, it is certainly

reasonable to, to allow a court to strike false and misleading statements on clear and convincing evidence, the burden that the government bears. Because otherwise, the unreasonable effect would be that a candidate could place into a candidate's statement, a false statement, in a close case, get himself elected, based on a falsehood. A falsehood is not a, that is not even protected speech, your Honor, and given that the burden is on the government to show by clear and convincing evidence that the statements are factually false, it is certainly reasonable for the, for the government to be allowed in this publication that goes to all voters, to strike false statements.

And, the strength of this statute, frankly, is that it, I see I'm going into my rebuttal time, but it, it is limited: that is, a candidate can go out and say whatever he wants, make whatever false statement that he wants. As the panel in this case said: "If he wants to, to, to disseminate that kind of disinformation, he's not entitled to the government's assistance."

JUDGE LEVY(?): How do you, how do you determine that the statement is false?

AFTERGUT: That is for a, a neutral magistrate to determine on the facts presented to him or her with a clear and convincing evidence burden of proof.

JUDGE LEVY(?): Isn't that judicial censorship?

AFTERGUT: It is judicial editing of a candidate's statement, yes, it is judicial editing of a candidate's statement that is false and misleading, and we submit that that's not protected by the first amendment.

JUDGE FLETCHER: Counsel, could I bring you back to your justiciability point for just a minute?

AFTERGUT: Yes.

JUDGE FLETCHER: I have in front of me the district court's order in which he frames in the very first paragraph the issues that were tendered by parties. He says there that plaintiffs challenge the constitutionality of three sections of the California Elections Code which permit voters or the City or county clerk to file suit and to delete from the pamphlet, etc. Then on the next page, he says, in addition, plaintiffs in the *Mark v. Corwin* case challenge the constitutionality of the Election Code 10012, which permits the clerk to delete from statements filed by the candidates. Now that's the administrative challenge that you speak of, but as to the rest, he claims that they are challenging the bringing suit to remove these statements. Now, is he correct in that or has he somehow misread the pleadings?

AFTERGUT: He misread the pleadings. Thank you.

JUDGE NORRIS(?): Counsel, this last argument, is that argument to apply to the part of the statute that prohibits party identification?

AFTERGUT: Yes. In the event that the court gets to substantive merit, which I don't believe the court should, for, for, for the first two reasons.

JUDGE WALLACE: Thank you counsel. Wish we had more time.

[CITY'S REBUTTAL ARGUMENT]

JUDGE WALLACE: Well, with that clarification, for which we thank you, that completes the time we've allotted [for appellees] and we'll have rebuttal. You may proceed.

AFTERGUT: I'm going to talk quickly because I have little time here. I'll try to see what I can do to clarify all of this.

Judge Wallace, you said with respect to the second claim for relief in *Mark v. Corwin*, the challenge to 10013.5, you said, the only time the City ever enforced §10013.5 was in 1986, and that was not live at the time that this suit was filed. That is our position. I want to make one small correction. The *City* did not use 10013.5 in 1986. That was a private action, and if you look at the record you'll see that was an action brought by an individual named Garfinkel. I think

it's at the Excerpts of Record, cross-appeal, 140 or 141, I'm not sure.

You don't have *any* instance, not even a *dead* instance in the past where the City used 10013.5.

It was, that was an action brought by a private voter. So I think with respect to the action against 10013.5, the challenge to 10013.5, you are left in very much the same position as the Supreme Court in *Renne:* You do not possess a factual record of any imminent or actual application of this section that would present the issue in clean-cut and concrete form. That's a quote from *Renne v. Geary.*

Mr. Smith was talking about listener standing. The problem with the second claim for relief in *Mark v. Corwin,* the challenge to §10013.5, is that the controversy was not live at the time it was brought, and there's no record of any actual or imminent enforcement by the City in this case, and I believe it is for *that* reason that that, that *that* challenge is not. . . .

JUDGE SCHROEDER(?): Is there any way that this can be tested in federal court, then, without having state mandamus proceedings and federal proceedings going on at the same time?

AFTERGUT: I, I think the place to challenge this, frankly, *is* state court. But there, there may well be a way. I hesitate to stand

here and advise my adversary about that, but there may be one.

JUDGE: BRUNETTI(?) How about the Trippett statement, what significance is it?

AFTERGUT: Thank you for reminding me about that. I, I'm at a disadvantage because I don't have the whole record. You are referring to part of the record that I don't have in front of me. But what Mr. Smith said, at any rate, was that that statement related to the, I believe, to the June 1988 election and at least with respect to 10013.5, I don't know whether this was an action under 10013.5, or if this was [incomprehensible], but that, that would also not be live, because this action was brought after the June election in August of 1988.

JUDGE RYMER: Not, not the *Geary* action. *Geary*, which is where I understood this one came up is 1987. So his point, I think, is that that makes that one live.

AFTERGUT: And, frankly, I don't, I don't have the record in front of me to answer, I don't know what that piece of evidence is. I haven't seen it before, so I'm sorry. I'm not able to assist the court on that point.

JUDGE NORRIS: Now Mark's claim that he should be permitted to state his party affiliation, and the first amendment gives him the right to do this.

AFTERGUT: In the voter pamphlet.

JUDGE NORRIS: In the voter pamphlet?

AFTERGUT: Yes. The claim, this only goes to whether he can say it in the voter pamphlet. He's perfectly free to say it wherever he wants.

JUDGE NORRIS: Oh, I understand, in the voter pamphlet. Of course, that's what we're talking about. Now, I just want to know whether that claim is still alive.

AFTERGUT: I believe that it is not and I believe that . . .

JUDGE NORRIS: And why not?

AFTERGUT: I, I believe that counsel has conceded it. Because he never sought that relief. The only relief he sought was the, was the invalidation *insofar*. . . .

JUDGE NORRIS: If we disagree with your reliance on the prayer for that purpose, would it still be alive?

AFTERGUT: Well, if you disagree with my reliance on the prayer and if you find that the case is redressable, which under *Renne* I don't think it is, then, then I kind of don't think, since he's conceded, I don't see how you can, but then you go into the *Clark v. Burleigh* analysis as a non-public forum.

JUDGE NORRIS: Well, I, I guess at least that that's, that that's getting to it on the merits.

AFTERGUT: That's getting to the substantive validity. And I'm a little concerned that some of the questions went to, "If we *affirm* Judge Zirpoli on this point." It's a little bit unclear what Judge Zirpoli did. As long as the court were clear that what Judge Zirpoli did was to say that §10012 may not be administratively censored [sic]. But if the court looks at the panel decision in this case in the first or second paragraph, the panel interpreted what Judge Zirpoli did, and I'm concerned about this, was that Judge Zirpoli invalidated 10012 in its entirety; that is, substantively as well as, as procedurally, and I don't believe that that would be proper.

Judge Rymer, you said you had trouble understanding what the Supreme Court case in *Renne v. Geary* was saying. Frankly, I think there are two messages. One message is: "Every doubt is resolved against justiciability." If you look at the language that the Court uses, they say, "There is reason to doubt. . . . "

JUDGE WALLACE: Can you bring your argument to a close quickly?

AFTERGUT: I will. And the second message is, in a forum case like this, in a voter pamphlet case like this, they want a speaker. They

don't want listeners, they want a speaker. Thank you.

JUDGE WALLACE: Thank you counsel. The case just argued will be submitted. We'll be in recess.